

QUARTERLY REPORT
OF THE
ATTORNEY GENERAL
OF
ALABAMA

For the Period
October 1, 1944
Through December 31, 1944
Volume XXXVII

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with Code 1940, Title 55, Section 228, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This Report covers all opinions rendered by the Attorney General from October 1, 1944, through December 31, 1944.

The Section of the Code referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State, and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Code Section also requires a copy of said Report be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in the State.

If you have any suggestions to make regarding the improvement of the service, we should be glad to receive it. We welcome your criticism.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials.

Very respectfully,
WILLIAM N. McQUEEN,
Acting Attorney General.

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1945

OPINIONS



October 2, 1944.

Hon. Ed Pettus,

State Licensing Board for General Contractors,

223-225 Bell Building,

Montgomery, Alabama.

Title 46, Section 78, 1940 Code—Licensing Board for General Contractors—License—General Contractors—Exemptions from License.

Officer, agent, servant, or employee (as distinguished from an independent contractor) of the United States government, State of Alabama, incorporated town, city, or county in this state, engaged in constructing or superintending the construction of a building, highway, sewer or other improvement for his employee is exempt from the licensing requirements of Title 46, Chapter 4, 1940 Code.

Opinion by Assistant Attorney General Cooper.

Dear Sir:

Your request for an official opinion bearing date of September 21, 1944, is as follows:

"Re: Acts 1935, P. 721, Sec. 13; Code 1940, T. 46, Sec. 78.

"The State Licensing Board for General Contractors has asked that I request of you an official opinion construing for the Board the extent and scope of the words 'an authorized representative or representatives of the United States Government, State of Alabama, incorporated town, city or county in this State' as being exempted from the provisions of this Act. For example, I propose the following fictitious case: a county board of education wishes to construct a school building the cost of which will exceed \$10,000.00. For such purposes they wish to employ a general contractor who is not licensed by this Board, said contractor to be under the supervision of a licensed architect of the State Board of Education. Would such contractor have to first qualify with this Board or would he be exempted as 'an authorized representative,' etc?"

Chapter 4, Title 46, 1940 Code, of which Section 78 is a part, was first enacted as law by the 1935 Legislature. **General Acts of 1935, Page 721.** It provides for the licensing of general contractors. It is a regulatory measure under the police power rather than a revenue enactment. **Biennial Report of Attorney General, 1936-38, Page 791.** The entire act must be construed together.

Section 65, Title 46 is as follows:

"§ 65. Definitions.—For the purpose of this chapter a 'general contractor' is defined to be one who, for a fixed price, commission, fee or

wage, undertakes to construct or superintend the construction of any building, highway, sewer, grading, or any improvement or structure where the cost of the undertaking is ten thousand dollars or more, and any one who shall engage in the construction or superintending the construction of any structure or any undertaking or improvements above mentioned, in the State of Alabama, costing ten thousand dollars or more, shall be deemed and held to have engaged in the business of general contracting in the State of Alabama."

It is a misdemeanor to engage in the practice of general contracting, as defined, without a license issued by the Board. (Section 77).

Section 78, the construction of a part of which you are particularly concerned with now, provides for exemptions from the licensing requirements as follows:

"§ 78. Exemptions.—The following shall be exempted from the provisions of this chapter: The practice of general contracting as defined in Section 65 of this title by an **authorized representative or representatives of the United States government, State of Alabama, incorporated town, city or county in this state**; provided, however, that such operation shall be under the supervision of a licensed architect or resident engineer, in the construction of any residence or private dwelling, and provided further that any contractor now licensed to engage in the business of general contracting in the State of Alabama shall prima facie be entitled to a license, unless good cause be shown to the board why such license should not be issued to him."

Without referring to this Section (then Section 13 of Act No. 297, 1935) the Attorney General in an opinion to you dated September 27, 1938, held:

"(1) A general contractor who performs work exclusively on Federal property in erecting an 'armory, arsenal, fort, fortification, navy yard, custom house, light house, post-office, or public building' is not required to qualify with the State Licensing Board for General Contractors.

"(2) Whether a general contractor, who performs work exclusively on Federal property for any purpose other than enumerated above, must qualify with said Board depends upon what jurisdiction the State of Alabama has ceded to the Federal Government over the land in question." **Biennial Report of Attorney General, 1936-38, Page 791.**

It, therefore, appears there are two tests for determining exemptions: (1) Is there a question of Federal sovereignty involved; (2) Does the awarding authority come within the class exempted by Section 78. See **Volume 12, Quarterly Report of Attorney General, Page 154).**

In the sense that it is used in Section 78, supra, "authorized representative or representatives of the United States government, State of Alabama, incorporated town, city or county in this state" means, in my opinion, an officer or officers, agent or agents, servant or servants, or employee or employees empowered to "stand in the place of" the United States government, the State of Alabama, incorporated town, city or county in this state. (See **37 Words and Phrases, Page 30, et seq.**) In other words, when the United States, State of Alabama, incorporated town, city or county in this state is

itself actually engaged in the construction or superintending the construction of any building, highway, sewer, or other improvements through its own officers, agents, etc., as distinguished from an independent contractor who engages to construct or superintend the construction of a building, highway, sewer, or other improvement for the United States government, State of Alabama, incorporated town, city or county in this state, the exemption is applicable. The exemption does not apply, in my opinion, to any person, firm, or corporation who is an independent contractor engaged in the construction or superintending the construction of a project under a contract with the United States government or the State, incorporated town, city or county in this state, except where Federal sovereignty is allowed as above stated.

The relation between the awarding authority exempted and the person engaged in the operation is the deciding factor. If the relationship is principal and agent or master and servant, the exemption applies; it does not where the relation is that of an independent contractor. The determination of this relationship is a mixed question of law and fact. This is the rule:

"Generally the distinction between the relation of principal and agent and employer and independent contractor is based on the extent of the control exercised over the employee in the performance of his work, he being an independent contractor if the will of the employer is represented only by the result, but an agent where the employer's will is represented by the means as well as the result." 2 C. J. S. 1027.

It follows that the answer to your hypothetical case cannot be definitely determined from the facts stated. All of the facts in the case, including the terms of the contract or engagement of the general contractor employed by the county board of education, must be tested by the rule above.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

October 3, 1944.

Hon. W. L. Pratt,

Judge of Probate,

Bibb County,

Centerville, Alabama.

Local Option Stock Law with the County as a Unit, Title 3, Sections 77, et seq., Code of Alabama 1940, does not authorize election within precinct.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of September 6, 1944, is as follows:

"The voters of Beat 13 have filed a petition in my office asking for an election so that the voters of said precinct may decide as to whether cows, calves, yearlings, bulls and oxen may run at large in said precinct. At present the law permits them to run at large, but the voters who petitioned for the election are asking for a vote to change the present stock law and to vote against allowing said animals to run at large in said Beat. I am confused, as Title 3, Sections 90 & 93 do not make it clear to me as how said election can be held. Please advise just how to proceed with said election."

It is unnecessary to point out the manner of holding an election on a question of whether cows, calves, yearlings, bulls, and oxen may run at large for the reason that the present law does not provide or require an election on said question within a district or precinct. Before the probate judge is required to hold an election, he must be presented with a petition of twenty-five per cent of the number of qualified electors voting in the county in the last preceding general election. Title 3, Section 90, Code of Alabama 1940.

Title 12, Section 11, Code of Alabama 1940, provides that "the court possesses original and unlimited jurisdiction in relation to the establishment, change, or discontinuance of roads, bridges, causeways, ferries and stock law districts within the county, except where otherwise provided by law, to be exercised in conformity with the provisions of the Code."

Prior to September 13, 1939, the date upon which the "Local Option Stock Law for the State of Alabama with the County as a Unit" was approved, the statutes regulating stock law districts provided for an election within any precinct or a county upon the petition of one-fourth of the bona fide free holders residing in such precinct, such election was for the purpose of determining whether or not it would be unlawful for livestock to run at large in said precinct or district. See Sections 10207, et seq., Code of Alabama 1923.

The Act approved September 13, 1939, known as the "Local Option Stock Law of the State of Alabama with the County as the Unit" made it unlawful for livestock to run at large in the State of Alabama. This Act, however, provided for an election upon petition of twenty-five per cent of the number of qualified electors voting in such county in the last preceding general election. Title 3, Section 90, Code of Alabama 1940. The effect of an election held under the provisions of Title 3, Section 90, Code of Alabama 1940, was, if the vote was in favor of cows, calves, yearlings, bulls, and oxen running at large, to preserve the status quo of those districts in said county which by previous law were open range districts permitting the running at large of cows, calves, yearlings, bulls, and oxen. 18 Quarterly Report of the Attorney General, p. 277; 20 Quarterly Report of the Attorney General, p. 208; Title 3, Section 90, Code of Alabama 1940; Title 3, Section 93, Code of Alabama 1940.

Section 17 of the Local Option Stock Law provides that "on and after March 1, 1941, all laws or parts of laws, general, special, local and private in conflict herewith are hereby repealed." It should also be noted that the statute requiring an election in a particular precinct to determine the question of whether stock should be allowed to run at large in certain precincts was not carried forward into the Code of Alabama 1940. Section 10208 Code of Alabama 1923.

It is my opinion that the "Local Option Stock Law for the State of Alabama with the County as a Unit" (Acts of 1939, p. 488, Title 3, Sections 77, et seq., Code of Alabama 1940) covers the whole subject matter of the former law governing stock law districts (Code of 1923, Sections 10207 et seq.), and that said Local Option Stock Law was intended to supersede prior enactments.

It is stated in your inquiry that the present law permits cows, calves, yearlings, bulls, and oxen to run at large in the precinct whose voters are now petitioning for an election. It is my opinion that the only manner now provided by law for making it unlawful for such animals to run at large is by an election under the provisions of Title 3, Section 90, Code of Alabama 1940 which requires a petition of twenty-five per cent of the number of qualified electors voting in such county in the last preceding general election.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

October 4, 1944.

Hon. Allan W. Lee,

Tax Collector, Etowah County,

Gadsden, Alabama.

Taxation—Tax Assessors—Tax Collectors—Commissions—Exemptions—Title 51, Sections 3, 39, 191, Code of 1940.

Tax Assessor is not entitled to the commissions provided for in Title 51, Section 30, Code of 1940, for making an assessment of property that has been exempted from taxation by the county and city governing bodies under the provisions of Title 51, Section 3, Code of 1940.

Tax Collector is not entitled to commissions provided by Title 51, Section 191, Code 1940, in respect to such property, for the reason that to the extent the property has been exempted from taxation by the county and city governing bodies under the provisions of Section 3, supra, no taxes can be collected by him on the same.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of September 16, 1944, is as follows:

"Your attention is directed to Title 51, Section 3, Code of Alabama of 1940, granting exemption from ad valorem taxes to certain factories, industries and plants.

"The Tax Assessor and Tax Collector of Etowah County assess and collect these taxes and perform the same functions in relation thereto as are performed on unexempt property. The taxes are then remitted to the proper state, county and city authorities and in turn the county and city authorities remit their proportionate share to the taxpayer.

"Inasmuch as we perform the same duties in relation to this exempted property as we do to unexempted property, on behalf of the Tax Assessor of Etowah County and myself, I wish to request your official opinion on whether we are entitled to the commissions for performing such services provided for in Title 51, Sections 30 and 191, Code of Alabama 1940."

Title 51, Section 3, Code of Alabama 1940, under which Section exemption from ad valorem taxation may be granted to certain designated factories, industries and plants, provides in pertinent part as follows:

"§ 3. Exemption of certain factories, industries and plants.— * * * the court of county commissioners, or other court or board having like juris-

diction of any county, and the constituted authorities of any city or town in which it is proposed to locate, or add to, or to extend any such factories or plants, are authorized and empowered to remit the taxes assessed for all county and municipal purposes, except for county school and school district purposes, on such factories or plants and on all extensions or additions to such factory or plant as are already built and operated, and on all plants, works machinery and other equipment of such factories or plants, or additions thereto, or extensions thereof, and also on all of the capital stock of such factories and plants, or increase of such capital stock made for the purpose of making the additions thereto or extensions thereof for a period not exceeding ten years from the date of the incorporation or organization of such factories or plants, if incorporated and organized under the laws of the State of Alabama, or for a period not exceeding ten years from the date of being granted permission to do business in the State of Alabama, if a foreign corporation, or from the date of completion of such plant or factory, or from the date of the completion of such addition or extension thereof. * * *

You state in your inquiry that taxes are assessed and collected on property that has been exempted from certain taxes by the county and municipal governing bodies under the provisions of Title 51, Section 3, supra, and that the amount of taxes collected on such exempt property are remitted to the proper state, county and city authorities. You state further that "the county and city authorities remit their proportionate share to the taxpayer."

It is evident from the procedure set out above that you have construed the expression "to remit the taxes" found in Section 3, supra, to mean that the county or city shall pay back such taxes. This is not the correct meaning of such expression as used in said Section. The word "remit" is defined in Webster's New International Dictionary, Second Edition (1936), as follows: "5. To refrain from exacting, inflicting, or enforcing; as to remit a penalty or the performance of an obligation."

The expression "refrain from exacting or enforcing" the taxes could have properly been used in the statute instead of the expression "to remit the taxes." It was the intention of Section 3, supra, that exemptions from certain taxes might be granted by the county or municipal governing body, and it was never contemplated that taxes should be collected on such property insofar as it was exempted under the provision of said Section.

Furthermore, if the procedure set out in your letter was followed, when the amount of the taxes collected on such exempt property was paid to the county or city, after deducting the commissions of the tax assessor and tax collector, the county or city in paying to the taxpayer the taxes collected on such exempt property, would have to add to the amount paid to such taxpayer an amount equal to the commissions deducted. There is no provision of law which would authorize such a procedure.

It, therefore, follows that the tax assessor is not entitled to the commissions provided for in Title 51, Section 30, Code of 1940, for making an assessment on such property insofar as it has been exempted from taxation under the provisions of Section 3, supra, neither is the tax collector entitled to the commissions provided by Title 51, Section 191, Code of 1940, in respect to such

property, for the reason that to the extent the property has been exempted from taxes under the provisions of Section 3, supra, no taxes can be collected by him on the same.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

October 4, 1944.

Hon. Ben P. Singleton,

Chief Examiner of Public Accounts,

Department of Finance,

C A P I T O L .

Refund—Taxation—Expeditious and Economical Tax Appeals Act of 1943—Title 51, Section 110 (1) et seq. Code of Alabama 1940.

Payment of original assessment pending appeal from valuation set by Board of Equalization, under provisions of Title 51, Section 110 (1) et seq. made voluntarily and under no mistake of law or fact cannot be refunded.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of July 28, 1944, is as follows:

"Please give me your opinion on the following:

"Title 51, Section 110, which deals with appeals by taxpayers from the rulings of the Board of Equalization, provides for an avenue of refund for taxes erroneously paid.

"The 1943 Legislature passed an alternate act (Acts 1943, page 230) which provides another avenue of appeal from the decision of the Board of Equalization in Jefferson County, which act does not include any provision for a refund of taxes erroneously paid.

"Section 2 of the 1943 Act, sets out as follows: 'When a taxpayer elects to take an appeal under the provisions of this act from a decision or ruling of the Board of Equalization fixing the assessed value of real

property, Section 110 of Title 51 of the Code of Alabama shall not be applicable to such an appeal.'

"I would like your opinion on the following question.

"A certain taxpayer in Jefferson County appealed from the decision of the Board of Equalization fixing the value on his assessments, and elected to take his appeal under the 1943 Act. Before the final determination of the Commission appointed to serve under the provisions of this act, and prior to the first day of January, the taxpayer voluntarily paid the tax collector the amount of his taxes as originally assessed.

"The question is: Since the taxpayer voluntarily paid the taxes as they were originally assessed, and as the 1943 Act makes no provisions for a refund of taxes erroneously paid, as does Title 51, Section 110, would the said taxpayer be entitled to a refund, should the Commission reduce the value of the assessment made by the Board of Equalization?

"Since the question is now pending on an examination being made by an Examiner of Public Accounts, I would appreciate your opinion as soon as possible."

We also have your request bearing date of August 14, 1944, as follows:

"Under date of July 28, 1944, we asked you for an opinion in connection with an instance where a taxpayer appealed the valuation on his property and subsequently voluntarily paid the taxes as assessed without awaiting the ruling of the Court. Our request was acknowledged in your letter of July 29, and you advised the request was referred to Assistant Attorney General Sykes.

"Recently you gave us your answer to our letter of July 28, declining to render an opinion in answer to the question submitted under the assumption that the matter was in the bosom of the Court for determination. Today I have received the following communication from the Field Supervisor in our work who brought the matter up.

"I have your communication from the office of the Attorney General, dated August 5th, in which he appears to be under the impression that the case referred to in your letter of July 28th is now pending in the Courts of Jefferson County.

"This is not the case, as the Board of Commissioners has already rendered its decision, and it is not the question of what the decision of the Board was; but as to whether or not the taxpayer is entitled to a refund under the conditions set out in my letter to you of July 27th.

"My contention has been, that when the taxpayer comes in and voluntarily paid the taxes as originally assessed, he has accepted the values set out in the original assessment; even though appeal has been perfected under the new law, which does not provide for a refund to the taxpayer in any instance and especially where the taxpayer has willfully and knowingly without protest and of his own

free will and accord come in and paid the taxes which had accrued on the original assessment.

"Please write the Attorney General to this effect and favor me with a copy of the letter, so that I may place it in my files here in the office."

"In view of the above communication from Mr. Frazer, will you please now render us your formal opinion in answer to the specific question asked in our letter of July 28, 1944."

It is my opinion that when a taxpayer pays the tax on an original assessment voluntarily and under no mistake of law or fact pending an appeal under the provisions of "The Expeditious and Economical Tax Appeals Act", Title 51, Section 110 (1), Code of Alabama 1940, and before judgment is entered correcting the assessed valuation, that the statutes afford no provision for refunding excess taxes paid should the court reduce the original assessment.

Title 51, Section 110, Code of 1940, provides for an appeal from the valuation placed upon the property by the Board of Equalization. Under this procedure objections must be first made before the Board of Equalization and such objections overruled. Title 51, Section 109, Code of Alabama 1940. Upon giving notice of appeal within 30 days, the taxpayer is required to file a bond to pay all costs and may demand a trial by jury. Under the regular appeal statutes (Title 51, Section 110) the taxpayer, at the time of taking the appeal, is required to pay the taxes due as fixed for assessment for the preceding tax year before the same become delinquent, and upon the taxpayer's failure to do so, the court must dismiss the appeal unless at the time of taking the appeal the taxpayer has executed a supersedeas bond in double the amount of the taxes, conditioned to pay all taxes, interest and costs. Section 110 further provides that if the valuation is reduced the taxpayer may recover the excess from the taxing authority, and if the valuation is increased, a judgment is rendered against the taxpayer for the increased portion. Section 110, therefore, after providing for the payment of the tax before it becomes delinquent and pending appeal or the execution of a bond conditioned to pay taxes, interest and costs, provides an adequate statutory remedy for a refund should the assessment be reduced.

Under the provisions of the 1943 Act, Title 51, Section 110(1), the taxpayer appeals from a decision or ruling of the Board of Equalization, fixing the assessed value of real property, by giving notice of appeal and stating his election to proceed under the 1943 Act, Title 51, Section 110(1), Section 3. The 1943 Act provides, "this section is alternative to and cumulative to Section 110 of Title 51 of the Code of Alabama; but when a taxpayer elects to take an appeal under the provisions of this section from a decision or ruling of the Board of Equalization, fixing the assessed value of real property, Section 110 of Title 51 of the Code of Alabama shall not be applicable to such appeal." We construe the above quoted provision to mean that the provisions contained in Title 51, Section 110, authorizing a refund, should the assessment be reduced, are not applicable to an appeal taken under the provisions of the 1943 Act, Title 51, Section 110(1). The 1943 Act does not require the payment of taxes as assessed for the preceding tax year before the same become delinquent; on the contrary, the 1943 Act provides for payment

of taxes and costs of the appeal "within 30 days from the date of the rendition of said judgment *** in the event said taxes are delinquent. Title 51, Section 110 (1), Section 12.

Considering the entire provisions of the Expeditious and Economical Tax Appeals Act, and especially Section 12 thereof, it appears that payment of the tax is not required to be made until 30 days from the date of the rendition of the judgment correcting the assessed valuation of the property. Neither payment of the taxes nor the execution of a supersedeas bond are required by the terms of the 1943 Act upon the taking of the appeal or upon the taxes becoming delinquent pending appeal. Since, therefore, the taxes are not required to be paid when an appeal is taken under the provisions of the 1943 Act, and when the tax becomes delinquent, there is no necessity for the Act to provide for a refund should the assessment be reduced. Upon electing to proceed under the provisions of the Expeditious and Economical Tax Appeals Act, the taxpayer may wait for 30 days after the rendition of judgment setting the corrected valuation before his property is subject to sale.

It has been decided by our Supreme Court that the valuation of property for taxation, as fixed by taxing authorities and confirmed by county boards of review, is conclusive evidence of such valuation and binding on the taxpayer and taxing authorities until set aside or changed by competent authorities on review as authorized by statute. *State vs. Menhoff*, 239 Ala. 584, 196 So. 130. Since the payment of the amount of the original assessment in the case presented by your inquiry was made before the original valuation was set aside by the court, it is my opinion that such valuation, until set aside, was binding on the taxpayer and upon the tax collector. We cannot say that at the time of the payment of the tax in the case outlined in your inquiry that the assessment was erroneous, because at that time the assessment had not been corrected by the judgment of the Circuit Court.

Since the Expeditious and Economical Tax Appeals Act of 1943 provides no method of refund it becomes necessary to decide whether the taxpayer is entitled to a refund pursuant to other statutes.

Title 51, Section 328, Code of Alabama 1940 provides for the recovery of taxes paid through mistake or by reason of double assessment that were not due upon the property of such taxpayer. It has been decided that this section refers merely to cases where there has been some clerical mistake or error in the assessment or collection of taxes. *State vs. Goldsmith*, 162 Ala. 171, 50 So. 394. From the facts stated in your inquiry it does not appear that the tax was paid because of a clerical error. See also Quarterly Reports of Attorney General, Vol. 14, page 115, stating that this section is not applicable to cases involving disputes concerning true taxable value of real property.

Title 51, Section 332, Code of Alabama 1940 provides for a refund in the case of payment of money under a mistake of law or fact. From the facts outlined in your inquiry I find no evidence of payment under a mistake of law or under a mistake of fact.

It is my opinion, therefore, that the taxes paid as outlined in your inquiry were paid by the taxpayer voluntarily and under no mistake of law or fact, but on the contrary, with a knowledge of the law and the facts, and in the absence of statutory authority, the taxpayer cannot be granted a refund.

Home Insurance Company vs. City of Birmingham, 236 Ala. 41, 187 So. 783;
National Bank of Boaz vs. Marshall County, 229 Ala. 369, 157 So. 444.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

October 5, 1944.

Hon. James M. Proctor,

City Attorney,

City of Scottsboro,

Jackson County,

Scottsboro, Alabama.

Ballots—Absentee Ballots—Code 1940, Title 17, Section 5—Elections

An absentee ballot to which there is attached by staples a mimeographed form of affidavit is not void and should be counted if such affidavit is properly executed and has not become detached at the canvass; the affidavit attached in such manner "forming a non-detachable part" of the ballot within the meaning of Title 17, Section 5, 1940 Code.

Opinion by Assistant Attorney General Cooper.

Dear Sir:

Your request for an official opinion, bearing date of September 29, 1944, is as follows:

"In a recent municipal election, absentee ballots were used, canvassed and counted where the affidavit did not form a part of the printed ballot. In other words, the ballot itself was printed by a printer but the affidavit in the form required by law was mimeographed and attached to the ballot by a hand stapler. We would respectfully request your opinion as to whether or not this mode of attaching the affidavit to the ballot is a sufficient compliance with the provisions of Section 5 of Title 17 of the Code of Alabama. It occurs to us that an affidavit merely attached to the ballots by clips or staples does not form a 'non-detachable part' of the ballot within the meaning of that section and that a ballot so prepared and voted should not be counted as provided in the last sentence of the subject section.

To answer your inquiry we must define the words of the statute. The statute is quoted as follows with emphasis supplied, to wit:

"§ 5. Form of ballots.—For every general, special, primary, or municipal election held in this state, there shall be printed, provided and furnished to the judge of probate of the county in which such election is being held, by those charged by law with the duty of furnishing other supplies for said elections, a sufficient number of ballots to be used by absentee voters, which ballots shall bear printed thereon the words 'Official absentee ballot,' and which said ballots, bearing said printed endorsement, shall also carry, attached thereto and forming a non-detachable part thereof, the printed form of affidavit required by section 62 of this title, if the election be a general, special or municipal election, or by section 67 of this title, if the election be a primary election. The said ballot shall be void and shall not be counted if the said affidavit is detached therefrom." Title 17, Section 5, 1940 Code.

The important words are: "attached"; "non-detachable"; and "printed".

According to Webster's Dictionary, one sense of the word, "attached", means to bind; to fasten; to tie; to connect. Therefore, "attached thereto" as used in Section 5, Title 17 means to be bound, fastened, tied, or connected to the ballot. The affidavit is fastened to the ballot with staples.

"Detachable" is the adjective form of the verb, detach, which means to separate; to part; to disunite. The prefix, "non" is merely negative and not emphatic as is the prefix "un-" or "in-". **Websters Collegiate Dictionary, Fifth Edition; 28 Words and Phrases, 706.** This indicates that "non-detachable part thereof" means a part of the ballot which is not capable of being readily disunited or disconnected from the ballot itself. The term implies a separate section or distinct unit or item of the ballot.

A "printed form" as here used is intended to mean, in my judgment, a form upon which the letters or words are fixed by typographical characters. A mimeographed form is sufficient compliance with that requirement. **33 Words and Phrases, 637 passim.**

Much might be said against the use of ballots prepared in the manner revealed by your inquiry. Such methods could easily lend themselves to fraud and corruption in elections. It has been held by the courts, however, in some instances at least, statutory provisions regulating elections are directory and not mandatory. Although statutory requirements are not strictly complied with, an election will not be vitiated for failure to comply in the absence of a showing of fraud. **Rainwater vs. State ex rel Strickland, 237 Ala. 482, 187 So. 484.**

My opinion is that the absentee ballots which were used in the recent election are not void and should have been counted if the affidavits were executed and had not become detached at the canvass; an affidavit attached in such manner form a non-detachable" part of the ballot within the meaning of Title 17, Section 5, 1940 Code.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

October 9, 1944.

Miss Sibyl Pool,

Secretary of State,

Montgomery, Alabama.

Corporations—Fees due on consolidation or merger—Title 10, Sections 4, 6, 36, 37, 95 and 196, Code of 1940.

In computing the fee provided by Title 10, Section 96, Code of 1940, on the consolidation or merger of corporations under the provisions of Title 10, Section 95, Code of 1940, such calculation should be based on the total amount of all the authorized capital stock of the merging or consolidating corporations, and not on the amount of the paid-in or outstanding capital stock of such corporations.

Opinion by Assistant Attorney General Arbuthnot.

Dear Miss Pool:

Your request for an official opinion, bearing date of October 2, 1944, is as follows:

"Pursuant to Sections 95 and 96 of Title 10 of the Code of 1940 the Secretaries respectively of Brown-Service Insurance Company, Inc., and Liberty National Life Insurance Company filed with me as of September 1, 1944, a Certificate of Adoption of Joint Agreement of Merger and Consolidation by the stockholders of said companies and have paid me the minimum fee of \$10.00, plus the cost of recording the certificate, and have agreed to pay any additional fees that may be found to be due.

"The question upon which I desire your official opinion is whether any additional fees are due.

"Both of these corporations are Alabama corporations. At the time of incorporation each of them paid charter fees of \$1.00 for every \$1,000 of their proposed capital stock, pursuant to Section 6 of Title 10. Both of them have increased their capital from time to time pursuant to Section 36 of Title 10, and at the time of each increase paid the Probate Judge the charter fee in the amount of \$1.00 for each \$1,000 of the proposed increases.

"As of the filing date of the Certificate of Adoption of Joint Agreement of Merger and Consolidation Brown-Service Insurance Company, Inc. had an authorized capital stock of \$1,000,000, of which \$500,000 was outstanding, and Liberty National Life Insurance Company had an authorized capital stock of \$500,000, all of which was outstanding. So that the aggregate sum of the authorized capital stocks of the merging and consolidating corporations was \$1,500,000.

"The Joint Agreement of Merger and Consolidation recites that the total authorized capital stock of the merged and consolidated corporation

shall be \$1,250,000, and the attorneys for these companies have expressed the opinion that inasmuch as the proposed capital stock of the merged and consolidated corporation is not in excess of the aggregate sum of the authorized capital stock of the merging and consolidating corporations the only fee to be paid upon the filing in this office of said Joint Agreement of Merger and Consolidation is the minimum fee of \$10.00, plus the additional cost of recording.

"On the other hand, if the fees provided in Section 96 of Title 10 of the Code of Alabama of 1940, should be based on paid in or outstanding capital stock, there will be a fee due. Please advise if the fees provided in this section are based on paid in or outstanding capital stock, or if they are based on authorized capital stock.

"We have accepted payment as outlined in the fifth paragraph of this letter subject to their agreement to pay such additional fees as may be found to be due and I request your opinion upon whether any such additional filing fees are due."

Under the provisions of Title 10, Section 6, Code of 1940, when a certificate of incorporation is filed with the probate judge of the county as required by Title 10, Section 4, Code of 1940, a charter fee of "one dollar for every one thousand dollars of the proposed capital stock, but in no case less than five dollars" must be paid to the probate judge for the use of the State.

In construing Section 6969, Code of 1923, which Section was brought forward into the Code of 1940 as Section 6, supra, it was held by this office in an opinion to The Chief Examiner, Department of Examiner of Accounts, rendered under date of September 25, 1928, Biennial Report of the Attorney General 1926-1928, page 743, that the charter fee of a domestic corporation should be calculated on the amount of the **proposed** capital stock and not on the amount of paidup capital stock.

When a corporation increases its capital stock as provided in Title 10, Section 36, Code of 1940, it must, under the provisions of Title 10, Section 37, Code of 1940, pay a "charter fee upon proposed increase of capital stock." This additional charter fee "should be computed by taking the amount of the capital stock before it is increased and subtract that sum from the total amount of the capital stock which includes the increased amount." Quarterly Report of the Attorney General, Volue 5, page 95.

The Brown-Service Insurance Company, Inc., had an authorized capital stock of \$1,000,000.00, of which \$500,000.00 was outstanding. This corporation, however, paid a charter fee based on the amount of its proposed and increased capital stock (1,000,000.00) and not on the amount of its outstanding capital stock (\$500,000.00). All of the capital stock (\$500,000.00) of the Liberty National Life Insurance Company has been paid-in or is outstanding, and, therefore, presents no difficulty in the solution of the question under consideration.

The corporations under consideration were merged or consolidated under the provisions of Title 10, Section 95, Code of 1940. The fee to be paid on the consolidation or merger of corporations (which is in fact a charter fee) is provided for in Title 10, Section 96, Code of 1940, which Section is as follows:

"§ 96. Fees for consolidation or merger of corporations.—Upon the filing in the office of the secretary of state of the copy of agreement of stockholders and certificate of secretaries for consolidation or merger of corporations as provided by the preceding section, there shall be paid to the secretary of state by the person presenting such agreement and certificate for filing for the use of the state, one dollar for every one thousand dollars of the proposed capital stock of the merged or consolidated corporation, which is in excess of the aggregate sum of the capital stocks of all the merging or consolidating corporations. Such agreement or certificate must not be filed by the secretary of state until such fee on the increase of the sum of such capital stocks is paid; but in any such merger a fee of not less than ten dollars shall be paid the secretary of state."

The answer to your inquiry turns on a construction of the expression "aggregate sum of the capital stocks of all merging or consolidating corporations."

In view of the fact that both of the corporations under consideration have paid a charter fee based on all of their authorized capital stock, which includes paid in or outstanding capital stock as well as capital stock that has not been paid-in or is not outstanding, it is my opinion that the expression referred to above should be construed to mean the authorized capital stock of the merging or consolidating corporations and not merely the paid-in or outstanding stock of such corporations.

Section 96, *supra*, in providing that a fee of "one dollar for every one thousand dollars of proposed capital stock of the merged or consolidated corporations which is in excess of the aggregate sum of the capital stock of all the merging or consolidating corporations" would indicate that it was the intention of the Legislature that the fee required of the merging or consolidating corporations would be a fee based on the amount of capital stock of such corporations on which a charter fee had not been paid.

In further support of the conclusion reached herein, I wish to call your attention to the following legal definition of the word "aggregate":

"'Aggregate' is defined as a sum, mass, or assemblage of particulars; a total or gross amount. It implies plurality of units whose total amount it represents, *** *Chapin v. Wilcox*, 46 P. 457, 458, 114 Cal. 498." *Words & Phrases*, Per. Ed., Volume 2, page 801.

Applying the above definition of the word "aggregate" in the instant case, it means the total or gross amount of the capital stock of the merging or consolidating corporations, i. e., the paid in or outstanding capital stock as well as the capital stock that has not been paid-in or is not outstanding.

The premises considered, it is my opinion that in computing the fee provided by Title 10, Section 96, Code of 1940, on the consolidation or merger of corporations, under the provisions of Title 10, Section 95, Code of 1940, that such calculation should be based on the total amount of all of the au-

thorized capital stock of the merging or consolidating corporations, and not on the amount of the paid-in or outstanding capital stock of such corporations.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

October 12, 1944.

Hon. Norvelle R. Leigh, Jr.,

Judge, Probate Court,

Mobile County,

Mobile, Alabama.

Mobile County—City of Mobile—Election—Precincts—Wards—Districts—Voting Places—Code 1940, Tit. 62, §§ 95-103, Tit. 17, §§ 7, 78-80, 91-119, 81-86, 55—Constitution 1901, § 190—Amendment XLI.

1. Mobile County Governing Body not authorized to create wards, election precincts or election districts in the City of Mobile or in other incorporated cities or towns in Mobile County for state and county elections. Such power is vested in the governing bodies of such cities and towns exclusively.

2. In such cities and towns voters are required to vote in groups of 600 or less, as arranged by the probate judge in alphabetical order from the list of voters kept in his office, for each ward or district.

3. In each such ward or voting district there should be but one voting place, centrally located, designated by the city or town governing body for municipal elections, and by the county governing body for state and county elections.

4. In all elections in such wards and districts the same list of voters, furnished by the probate judge, should be used.

5. Code 1940, Tit. 62, Subd. 6, §§ 95-103, and Code 1940, Tit. 17, §§ 91-119, not subject to attack as unconstitutional.

6. Code 1940, Tit. 17, § 80, subject to qualification by § 79, so as to permit voting machine precincts or districts to contain a maximum of 600 voters.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of August 17, 1944, is as follows:

"The Board of Revenue and Road Commissioners of Mobile County has passed a resolution under the terms of which Ward Eight, which ward lies wholly within the limits of the City of Mobile, is divided into three election districts. There is no recital in the resolution as to the number of legal voters contained in Ward Eight, but it is a matter of common knowledge that Ward Eight contains approximately five thousand legal voters, and there will be contained in each of the election districts created by this resolution approximately one-third of this number. The city of Mobile likewise proposes to take action providing either for the creation of new wards in Ward Eight or its division into election districts. This action on the part of the Board of Revenue and Road Commissioners and the proposed action of the City of Mobile raises a number of questions:

"ONE: Is the governing body of a county authorized by law to create, divide and subdivide the entire area of a county into precincts and election districts for all elections held in the county, other than municipal elections, irrespective of whether any part of such area might lie within the corporate limits of a city or town, or do municipalities have the exclusive right to divide the areas within their corporate limits into voting units which are required to be used in state and county elections? It seems that it could never have been the legislative intent that the Board of Registrars should be required to furnish lists of voters segregated as to certain voting districts or precincts for state and county elections and to furnish other lists segregated according to wards for municipal elections. It seems that either the County or the municipalities in the county should have the exclusive right to determine the voting areas within municipal corporate limits in order to avoid an unnecessary duplication of work.

"TWO: Are Sections 95-103 of Title 62, setting up in Mobile County a system for the establishment of precincts and wards, the division or re-division thereof, the naming of polling places therein, the providing of polling lists by the Probate Judge, and the assignment of voters to voting boxes in accordance with the position that their names appear in the alphabet, violative of Section 190 of the Constitution of 1901 as amended providing that election laws shall be uniform throughout the State.'

"THREE: Section 77, Title 17, provides that when election precincts contain more than 500 legal voters they shall be divided or subdivided. Section 79, Title 17, provides that no election district shall contain more than 300 legal voters except in districts where voting machines are used and Section 94, Title 17, requires that there be provided 'at least one voting machine for each 600 registered voters or fraction thereof' at each voting place. Section 80, Title 17, makes it mandatory that the County Board divide or redive an election district when it contains more than 300 legal voters. Since Sections 79 and 80 are apparently in conflict, which section controls? Is the limitation of the number of voters to be contained in election districts removed where voting machines are used? Is the limit set at 600 rather than 300 because of the provisions of Section 94, Title 17? Are the provisions of Article 7, Title 17, relating to the use of voting machines violative of Section 190 of the Constitution of 1901, as amended, where such provisions do not conform to the general election

laws and do not pertain to the use of the said machines 'for registering or recording and computing the vote?' Since the 41st Amendment of the Constitution, amending Section 190, only authorized passage of laws providing for use of voting machines for 'registering or recording and computing the vote,' are the provisions of Section 94, Title 17, authorizing the use of voting machines by 600 voters violative of this Section of the Constitution as amended? Is the exception in the number of voters to be contained in an election district where voting machines are used (Section 79, Title 17) violative of the Constitution because of the same reason?

"FOUR: Do the provisions of the Local Act of the Legislature, Acts 1884-85, Page 402, affect the authority of the Board of Revenue and Road Commissioners of Mobile County as granted by the general law to create precincts and election districts in the area now in the City of Mobile or in the area set out and described in the Act?

"FIVE: Section 77, Title 17, requires that when any election precinct now existing contains more than 500 legal voters such precinct shall be divided into election districts. Section 79 states that no election district shall contain more than 300 legal voters except where voting machines are used. Section 80 seems to make it mandatory that where an election precinct contains more than 300 voters the governing body of the county shall immediately divide such precinct 'into election districts so that no one district therein shall contain over 300 legal voters.' An opinion of the Attorney General (Annual Reports of the Attorney General, October 1, 1934, to September 30, 1936, page 331) seems to hold that not more than 300 voters shall be contained in one election district. Has the Board of Revenue and Road Commissioners of Mobile County the authority to subdivide Ward Eight into three election districts where each election district so created will contain more than 300 legal voters?

"SIX: The Attorney General gave an opinion that where voting precincts were established by local law prior to the adoption of the Constitution of 1901 only the legislature can change the same, Report of the Attorney General, October 1, 1936 to September 30, 1938, page 527.

"SEVEN: The City of Mobile was incorporated by an Act approved March 5, 1901, Acts of the Legislature, 1900-01, pages 2342-2401. According to the terms of this act the City of Mobile was divided into Eight Wards. In the light of the decision in *Schulte vs. Wilkie*, 167 Ala. 663, 52 So. 526, and the opinion of the Attorney General in Annual Reports of the Attorney General 1936-38, Page 527, will it take an act of the legislature to divide or subdivide these wards into wards or election districts, or can it be accomplished by an ordinance of the governing body of the City of Mobile or by a resolution of the governing Board of Mobile County?

"EIGHT: Section 38, Title 17, of the Code requires the Probate Judge, from the Registrar's list heretofore and hereafter returned to his office by the Board of Registrars, to make 'a correct alphabetical list of all electors registered' by precincts and by districts in precincts where election precincts have been divided or caused to be divided. This same Section requires the Probate Judge after he has received a report from the tax collector showing payment of poll taxes to make a 'correct alphabetical list of all qualified electors registered by precinct and by districts of precincts where precincts have been divided or subdivided and who have paid all poll taxes due.' This was done by my office, and the two pub-

lications required by this section were also made. I do not find in any part of the election laws any duty or authority imposed upon or given to anyone to segregate voters or place their names in an election district when a precinct has been divided into such districts. I feel quite certain that the Probate Judge has no such authority. The only authority imposed upon him by this section mentioned is to furnish election officers lists of said qualified electors in such wards or precincts preceding every election or primary. This section imposes no duty upon or gives the Probate Judge any authority other than to make up lists from the reports made by the Registrars. How can he without legislation revise the list of registered and qualified voters so as to show which of them reside or are qualified to vote in their respective election districts created by the County Board when there is nothing on the list of registered voters from which the Probate Judge can determine in which voting district a particular voter resides after his ward or precinct has been divided into election districts?

"NINE: Section 86, Title 17, provides that no voters, after a precinct has been divided into districts, shall cast his vote in any election 'at any place other than the election district in which said voter is at such time registered as a qualified elector.' There are no voters registered in any election districts in this county because there were no such districts prior to the resolution of the County Board. The Registrars will not meet again until October (Section 27, Title 62). When they meet will they have authority to revise the registration list for Ward Eight and place the name of each voter in the district in which he resides and will it thereby make him a duly registered voter in such district? Will the Probate Judge have authority when he makes his 1945 lists of registered and qualified voters to list the names in the district named by the Registrars? Will it be necessary for the voters registered in the election district created by this resolution to reregister or transfer his registration?

"TEN: Section 55, Title 17, authorizes and directs the Judge of Probate in all counties having a population of not less than 100,000 or more than 150,000, according to the last or and subsequent Federal census, to employ a clerk to assist the Board of Registrars and makes it the duty of such clerk among other things to submit to the Registrars a revised election list of the county by placing all persons in their proper wards or precincts. Mobile County by the 1940 Federal census has a population over 100,000 and less than 150,000. Does this Section of the 1940 Code, having gone into effect subsequent to the Act creating Civil Service for this county, authorize the Probate Judge without further authority to employ such clerk, or will it be necessary to obtain consent for his employment from the Personnel Board of Mobile County. If such clerk is employed with or without the consent of the Personnel Board, will he have authority to acquire the desired information as to the residence of voters in the respective districts of Ward Eight or will the Board of Registrars on such recommendation have the authority to make an entirely new list of registered voters for this ward showing the district of each voter who has heretofore registered in Ward Eight? Section 7 of Title 37 gives to the governing body of cities the right by ordinance to divide such cities into not less than three nor more than fourteen wards, except as is otherwise provided in the section and further provides that where a city exceeds 50,000 population the number of wards may be increased, one ward to be created for every 4,000 population over 50,000. There is no provision con-

tained in this section of the Code with reference to the number of legal voters to be contained in each ward, the only provision being that the ward shall contain 'as nearly as may be the same number of inhabitants' Chapter 5 of Title 37 contains several articles providing for different methods of extending the limits of cities. Article 2 of Title 37 sets up a method for the extension of the limits of cities of 25,000 inhabitants or more, providing for an election and granting exemptions from taxation to the residents of the area voted to come into the city under the provisions of this article. Section 170 of Article 2, Title 37, provides that where the limits of a city have been extended under this article the governing body of the city 'shall by resolution or ordinance divide the respective wards in the city into voting precincts, as many as may be necessary, and each elector shall vote in the precinct of his residence, and the boundary of such voting precinct shall be arranged and rearranged from time to time so, as near as practicable, that not exceeding 300 electors reside in any voting precinct, except where voting machines are used. The limits of the City of Mobile are extended under the provisions of the then existing law which now appears as Article 2 Chapter 5, Title 37. Since that date the limits of the city have been further extended, both by legislative act and under the provisions of law which now appear as Article 1, Chapter 5, Title 37. Do the provisions of this Section 170, Article 2, Title 37, apply to this subject generally or is its application limited only to those cities where the limits of the city have been extended under the provisions of this article? Do the provisions of Section 170, Title 37, still apply to the City of Mobile, or is it now subject to the provisions of Section 7, Title 37 alone? Because of the exception made in Section 170, Title 37, as to the number of the voters in a precinct where voting machines are used, does this exception remove entirely the limit as to the number of voters who may reside within a voting precinct? Does it limit the number to 600? Is this exception where voting machines are used violative of Section 190 of the Constitution of 1901, as amended, in that it does not provide for a uniform election law throughout the State?"

Under the voting law for Mobile County there shall be but one voting place in each ward in incorporated cities and towns in the county, to be designated by the city or town governing body for municipal elections, and by the county governing body for state and county elections.

For the purposes of voting in all elections in such wards and districts the probate judge is required to divide the registered voters in each ward or district into groups of not more than 600 voters, alphabetically arranged.

If, for example, the eighth ward in the City of Mobile has, as stated, 5,000 registered voters, it will be necessary (a) to make a list in alphabetical order of all 5,000 voters; and then (b) to divide that list into nine separate parts or lists, of which the first eight lists will contain 600 voters each, and the last or ninth list will consist of the remaining 200 voters. Thus the first list will begin with a voter with a name beginning with the letter "A" (Abraham for example) ending with the name of the 600th voter shown on the original (or master) list of all voters in the ward; the second separate list begins with registered voter number 601; the third list with number 1201 and so on to the end.

For each group-list of 600 voters or less thus made there must be a separate set of election officials, a voting booth, and a separate voting box in the

one central voting place (Code 1940, Tit. 62, § 99), in the ward or district. Such voting booths and boxes must be so marked as to indicate to the members of each group the appropriate booth and box at which they shall vote.

So much for municipal elections.

For state and county elections held in city and town wards and districts, the same procedure applies, except that the county governing body designates the one central voting place in each ward or district. The same lists of voters in alphabetical groups of 600 or less will be used, however, and the same number of booths and boxes so marked as to indicate to each voter his or her appropriate booth and box. And in such cases the county governing body will select the necessary number of sets of election officers, one set for each box (Tit. 62, § 100).

Outside cities and towns, in so-called county precincts and voting districts, the voting procedure is much the same as that prevailing elsewhere in the state, and is under control of the county governing body exclusively as to designation of voting places and other necessary details. Alphabetical groupings are not required to be made.

When voting places have been established by city or town governing bodies for municipal elections in the various wards or districts, additional wards or districts can be created only by action of the city or town governing body, by "abrogating or rescinding" its former orders and making a new order not less than sixty days before the election to be affected thereby. (Title 62, § 102).

The general election laws require that election precincts including city or town wards (Tit. 17, § 78) with 500 or more voters be divided into election districts with not more than 300 voters each except voting machine districts. (Tit. 17, §§ 79, 80). In other words the original election law under which voting precincts (including city wards) were required to be subdivided into voting districts, or to be rearranged and re-adjusted, whenever it appeared at some election that the precinct contained more than 300 voters (Tit. 17, §§ 81-86) has been amended by virtue of Tit. 17, §§ 79, 91-119, to the extent that precincts, wards and districts with not over 600 voters are now authorized, if they use voting machines.

A precinct, ward or district with a voting machine may contain as many as 600 voters; otherwise not over 300.

In view of the foregoing if under the Mobile County Law cities and towns in the county use voting machines there would seem to be no material conflict between the local and the general law in the manner of holding elections.

If, however, Mobile County cities and towns do not use voting machines a more difficult question arises in that under its quasi-local law in such cities and towns the maximum capacity of voting boxes will be 600 voters each, whereas, under general law such boxes are limited to a capacity of 300 voters each. Whether or not this variance between local and general law is a matter merely of detail or a matter of material substance must be determined. Does a variation amount to a lack of uniformity such as is required by Section 190 of the Constitution of 1901 as amended by Amendment XLI?

With reference to the uniformity throughout the state of elections laws it was said in *State v. Black*, 224 Ala. 200, on p. 204 (8-9):

"While uniformity, is demanded, the lack of uniformity that is not more than a mere irregularity as relating to a special election, and **which does not prevent a fair and unrestricted expression of electoral franchise under the legislation in question**, does not render it void. *Lovejoy v. Beeson*, 121 Ala. 605; *Garrett v. Cunningham*, 211 Ala. 439; 100 So. 845." (Emphasis added.)

The words in Section 190 of the Constitution "shall provide by law for the manner of holding elections and of ascertaining the result of the same" are "in the nature of a constitutional definition or limitation upon the general provisions in Sec. 5 Art. 8 of the Constitution of 1875. And thus were the words 'regulate and govern' defined *** as to the matter of substantive requirement for uniformity." *State v. Black*, supra.

Lovejoy v. Beeson, 121 Ala. 605 (1898) holds that designating places for holding elections is a matter that may be delegated by the legislature. Semble, the place of election is not matter of substance.

" *** conceding that it (Constitution, Section 190) applies to laws providing for elections in the various counties, this law makes provision for all of the counties **according to their several needs**, and in providing for so many counties, differently situated, it is necessary that they be classified **according to their several needs and conditions**." Ex parte *Bud Owens*, 148 A 402, 406, (Emphasis added).

And in *McCall v. Automatic Voting Machine Co.*, 236 Ala. 10, 12, 180 So. 695, *Lovejoy v. Beeson*, supra, was cited and approved as holding that no uniformity was required as to "the naming of the place or structure in which the elections were to be held."

The provisions of the Mobile County law were brought into the Code of 1940, as Title 62, Art. 14, Subdivision 6, from Gen. Acts 1932, Ex. Sess. p. 30, (Act No. 33, H. 221, approved Sept. 24, 1932), with addition of a proviso, or rule of construction (Tit. 62, § 103), to the effect that in case of conflict with Title 17, Ch. 1, Art. 7 (the Voting Machine Act) the latter should prevail.

By reason of re-enactment in the Code and as the latest expression of legislative will, such provisions must prevail as against seeming conflicts with other statutory law, other than the voting machine law, if they meet the test of uniformity declared by Amendment XLI to the Constitution.

The amendment preserves uniformity, with the proviso, that the legislature may by general or local law permit the use of voting machines for registering, recording and computing the votes at all elections in any county, municipality or other political subdivision of the State under regulations provided by general law. *Abrasley v. Jefferson Co.* 241 Ala. 660.

The Supreme Court decisions construing Section 190 before amendment and the corresponding section of the Constitution of 1875, indicate that the requisite uniformity relates to matters of substance, rather than matters of detail or form.

It has been said that such uniformity is designed "to preserve the untrammelled expression of the choice of the elector, to the end that no qualified elector be deprived of the privilege that is accorded by law to vote, and may freely and intelligently cast his or her vote under the Constitution and Statutes." *Mitchell v. Kinney*, 242 Ala. 196, 5 So. 2d 788, 792; *Garrett v. Cunningham*, *supra*.

The decision in the McCall case, *supra*, before adoption of Amendment XLI, was based upon the holding that an Act authorizing use of voting machines in some counties and not in others violated the Constitution at that time, because "in order to conform to Section 190, it must govern and have uniform application throughout the state *eo instante* and not leave it to the will of some governing board to put it into operation in a single or part of the counties." That objection to voting machines has been removed by the Amendment, which expressly authorizes the legislature, by local or general law to provide for the use of voting machines. And the legislature has undertaken so to provide by general law (Code 1940, Tit. 17, §§ 91 et seq.) *Abrasley v. Jefferson County*, 241 Ala. 660, 4 So. 2d 153, 157.

The only substantial difference between the Mobile County law and general law as to voting and voting places seems to be that in Mobile County the maximum capacity of a box is declared to be 600 voters, whereas under general law the maximum capacity is 300 voters, except where voting machines are used.

In my opinion this variation cannot **materially** affect the manner of holding the election or ascertaining its result, and cannot operate to impair "the untrammelled expression of the choice of the elector." So far as I can see the voter's substantial rights as a voter are just as great as they would be if Mobile County were operating under the general law.

Indulging the presumption of validity, and keeping in mind the reluctance of courts of last resort to declare an act of the legislature void, I am of opinion that the Mobile County law is not subject to attack under Amendment XLI. Being of the opinion that the Mobile County law is not subject to attack and is the latest expression of the legislature as to voting and voting places in that county, and as such must prevail over conflicting general law, I shall undertake to answer the blocks of questions numbered "one" to "ten" above propounded, wherever in my opinion they admit of answer, to-wit:

1. For answer to "One" I am of opinion that, under the provisions of Title 62, §§ 95-103, there can be but one voting place in any one ward or voting district in an incorporated city or town in Mobile County, to be designated by the governing body of the city or town for municipal elections and by the county governing body for state and county elections, and that the county governing body is not authorized to divide such areas or territory into election districts. The power to make such divisions resides in the city or town governing body exclusively as implied in Section 102, Title 62, Code 1940 and declared in Tit. 37, Section 7. As to such areas or territory the county governing body's power is limited to designation of a central voting place in each ward or district.

II. Already answered "No."

III. Section 80, Title 17 is in my opinion subject to qualification by Sec-

tion 79, and its limitation is inoperative in districts using voting machines. This construction is in accord with Section 94 authorizing use of one voting machine for each 600 voters.

The limitation to 300 of the number of voters in election districts is removed where voting machines are used. Apparently the limit is raised to 600 to harmonize with Section 94, Title 17. The provisions of Art. 7, Tit. 17 relating to use of voting machines do not violate Const. § 190 as amended, inasmuch as such provisions are part of the general election law. Tit. 17, §§ 79, 94, are valid.

IV. In my opinion the county governing body is without authority to create precincts and election districts in the city of Mobile. That authority is vested in the city governing body. Act No. 262, H. B. 834, approved Feb. 12, 1885 (Acts 1884-85, p. 402) providing for election of justices of the peace and constables does not affect the question.

V. Answered in IV. The opinion of the Attorney General (1934-36, p. 331) to which you refer is subject to qualification because of the subsequently enacted voting machine law.

VI. No question is asked.

VII. *Schulte v. Wilkie*, 167 Ala. 663, 665, 52 So. 526, holds that "The legislature having fixed the number of precincts and the justices of the peace for same, the boundaries or divisions, in so far as they relate to the office of justice of the peace, could only be changed by the Legislature." The case recognizes however the power of the city governing body to "create new wards and divide said wards into voting precincts," as provided by Code 1907, §§ 1106, 1107. The opinion of the Attorney General to which you refer was based on this case, but its limited effect was overlooked. The opinion should be qualified or limited accordingly. I am of opinion therefore that the City of Mobile, for all purposes other than election of justices of the peace and constables, may increase the number of its wards. Code 1940, Tit. 37, § 7.

This power is recognized and arises by implication also in Section 102 of Title 62, relating to creation of new election districts or wards not less than sixty days before an election. Such provision is to be construed in connection with Tit. 37, § 7, supra, expressly conferring the power and providing the manner for its exercise, and may be accomplished by ordinance of the city, and not by the county governing body.

VIII. Your statement of the law as to matters discussed in question "Nine" is in my opinion correct. Once you have complied with Title 17, Section 38, no further duty devolves upon you, except that of dividing the list of voters in city wards and voting districts into groups of 600 as required by Title 62, §§ 95-103—a duty expressly imposed thereby. I have already indicated how this should be done. Otherwise, as you say, if an election precinct is divided into districts after your lists have been completed there is no means whereby to determine what voters reside in the newly created districts.

IX. As already stated the county governing body is not authorized to divide ward Eight into voting districts. As to that ward your duty is merely to divide the list of all voters in that ward into groups, sections, or "separate

lists." Each group will then have a box all its own in a voting booth at the centrally located voting place in the ward. This is a matter for the attention of the city authorities. Until the city undertakes to create new wards as authorized by the municipal Code, more than sixty days before the next election, there is no occasion for further separation of voters into groups.

X. The clerk employable by the Probate Judge to assist the Board of Registrars pursuant to Code 1940, Tit. 17, § 55 is an "employee" or "appointee," as defined in Local Act No. 470, H. 952, approved Sept. 15, 1939 (Local Acts 1939, p. 298), in the "Classified Service," which includes employment existing when the Act was passed or thereafter existing, paid for out of public county funds. Such clerk is, therefore, subject to the County's Service System, not being in the unclassified service. (§§ I, II). The Act expressly includes employment created after its passage, as well as employment then existing. Such Clerk's duties are, in general terms, to assist the Board in revision of the election lists of the county, and among other things to place or list them in the proper wards or precincts in which they reside and are entitled to vote and to do the Board's clerical work. There would seem to be no occasion, however, for him to seek information as to any voters in Ward Eight, because it has not been legally divided into districts. Nor is there occasion for the Board to make an entirely new list for said ward, but merely to revise and purge the existing list.

For answer to your remaining questions as territory taken into the City of Mobile by extension of its limits under Title 37, Articles 1 and 2, and by legislative Act, I am of opinion that the provisions of Section 7 of said title, applicable to cities with a population exceeding 50,000 must prevail and should be followed, under the rule of construction that in case of conflict between a statute of general application and a statute of particular, or limited application, the latter must prevail. It would seem to be quite hopeless to undertake to harmonize and reconcile the clashing and inconsistent provisions of the various Code Sections which you cite. I am inclined to the opinion therefore that section 170, Title 37 does not apply to the city of Mobile, and that it is subject to the provisions of Section 7 alone. **Specialia generalibus derogant.**

In the absence of a specific statement of facts as to any particular area or territory taken in under Title 37, Ch. 5, Arts. 1 and 2, I am unable to form a more definite opinion than, as above.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

October 16, 1944.

Hon. Y. K. Lewis, Chairman,

Marengo County Board of Revenue,

Linden, Alabama.

Code 1940, Tit. 12, § 12 (22)—Const. 1901, § 94—Counties—Appropriations for manufacturing plants.

A county is not authorized to appropriate public funds for the purpose of locating and promoting a canning plant or factory in the county.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion bearing date of October 10, 1944, is as follows:

"The Board of Revenue of Marengo County has been requested to appropriate \$1,000.00 for the erection of a canning plant, to be located at Sweet Water, Alabama.

"This project is also being financed, in part, by the State and Federal Government and private subscription.

"The Board of Revenue is very anxious to make possible this service to its people of Marengo County, but the question of the legality of making this appropriation has been raised, therefore, we are herewith asking for an opinion on this case."

Code 1940, Tit. 12, § 12, subd. (22) purports to authorize counties "to set aside, appropriate and use county funds or revenues for the purpose of developing, advertising and promoting the agricultural, mineral, timber, water, labor, and all other resources of every kind of their respective counties, and for the purpose of locating and promoting agricultural, industrial, and manufacturing plants, factories and other industries in their respective counties."

Section 94 of the Constitution 1901, however, reads as follows:

"Sec. 94. The legislature shall not have power to authorize any county, city, town, or other subdivision of this state to lend its credit, or to grant public money or thing of value in aid of, or to any individual, association, or corporation whatsoever, or to become a stockholder in any such corporation, association, or company, by issuing bonds or otherwise."

In *Stone v. State*, 223 Ala. 426, 136 So. 727, it was held that by reason of the above quoted section of the Constitution, the above quoted statute could

not be construed to authorize the county to enter into a contract whereby it would pay public funds to a broadcasting corporation as an inducement to its location in the county for the purpose of advertising and promoting the county's resources and advantages.

With reference to the anticipated public benefits to accrue to the county by reason of such advertising, it was said, quoting from *Southern Railway Company vs. Hartshorne*, 162 Ala. 491, 50 So. 139:

"If the public benefits were held to be sufficient to take the act without the prohibition, then its ordaining in two Constitutions in this state was wholly vain. In the *Garland* case a pecuniary liability was attempted to be incurred. The same reason that forbade that course of procedure to aid private enterprises is present to condemn the diversion of public revenue in this instance. The provision is no more explicit against becoming a stockholder or affording credit by the issuance of bonds than it is that money shall not be granted. In all enterprises like railroads, canals, pikes, manufacturing establishments, etc., benefits naturally accrue to the community concerned, and it is common experience that this is true. Because it is true the trustees of government are and have always been amenable to it as an influence to induce the lending of the credit or granting the funds or property of the subordinate governments to the aid of such enterprises as foreshadow public benefits. This disposition, natural and inevitable of gratification if not restrained, cannot be gratified by those who have control. The very existence of this disposition has resulted in the creating of the prohibition. To permit it to yet prevail is to annul one of the wisest of the Constitution's provisions.' 162 Ala. 494, 495, 50 So. 139."

So also in *Griffin v. Jeffers*, 221 Ala. 649, 130 So. 190, with reference to statutory power of counties to purchase or establish toll bridges, free bridges, causeways, and ferries as affected by the Constitutional provision in question it was said:

"*** These statutes contemplate that the power so conferred shall be exercised by the counties in their own names and rights, without entangling alliances with individuals or private corporations. *** To construe these statutes as authorizing the contract here involved—clearly a loan of the county's credit to aid Kershaw and his associates to construct a privately owned toll bridge—would render them violative of the Constitution." Citing *Garland vs. Board of Revenue of Montgomery Co.*, 87 Ala. 223, 6 So. 402.

I am of opinion, therefore, that the Board of Revenue of Marengo County is not authorized to appropriate money for the erection of a canning plant to be located at Sweet Water, Alabama, under the facts and circumstances above stated in your request for this opinion. To make such an appropriation would obviously violate Section 94 of the Constitution, notwithstanding the fact that Section 12, Subd. (22) of Title 12 of the Code apparently authorizes such appropriations to be made.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

October 18, 1944.

Hon. John D. McQueen,

Trustee, Alabama State Hospitals,

Tuscaloosa County,

Tuscaloosa, Alabama.

Alabama State Hospitals—Board of Trustees—Mount Vernon Barracks Military Reservation—Acts 1900-01, p. 358—

Alabama State Hospitals for and in name of the State authorized to execute an oil and gas lease of lands held under grant by Congress at Mount Vernon and set aside for the use of the insane of the State by Act No. 147, S. 4, approved Dec. 11, 1900 (Acts 1900-1901, p. 358), provided revenue thereby obtained is used for maintenance and support of the insane by Alabama State Hospitals.

Opinion by The Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of October 12, 1944, is as follows:

"Under the authority of an Act of Congress approved March 1, 1895 entitled 'An Act granting the Mount Vernon Barracks Military Reservation to the State of Alabama for public purposes', Daniel S. Lamont, Secretary of War on March 13th, 1895 executed a grant or patent to the State of Alabama conveying to the State of Alabama 'for public purposes' the lands in Mobile County on which the negro insane hospital is now located. Herewith I hand you a copy of this grant. See also State Acts 1900-1, page 358.

"The Alabama State Hospitals contemplate executing a gas and oil lease to and with the Humble Oil & Refining Company covering the lands included in this grant.

"As a member of the Board of Trustees of the Alabama State Hospitals I hereby request your official opinion on the following questions:

"1. Under the wording of this grant does Alabama State Hospitals have the right to execute a gas and oil lease on the lands thereby conveyed?

"2. Would the attempted execution of such a lease on said lands have the effect of vitiating this grant, or of giving the Federal Government the right to take back to itself title to the lands in question?

"3. In light of the wording of said grant, can Alabama State Hospitals with safety execute the contemplated gas and oil leases on the lands described in the grant.

"Your prompt attention and careful official answer to the above and foregoing questions will be greatly appreciated."

In an opinion rendered February 6, 1942, upon the request of Dr. W. D. Partlow, Superintendent of the Alabama State Hospitals, (Quarterly Report, Attorney General, Vol. 26, page 93) this office held that "title to the lands in question is in the State of Alabama which holds said lands in trust for public uses and purposes and that the Board of Trustees of the Alabama State Hospitals is without authority or power, under Code of 1940, Title 45, Section 190, to sell or convey said lands, although, of course, under the present (sic) terms of Act No. 147, supra, said Board is authorized to use the lands for hospital purposes for the use of the insane of the State."

I adhere to the conclusion reached in that opinion that the Board is without authority to sell or convey said lands. By this, however, it must not be assumed that the Board may not make such contracts for the use of said lands by lease or otherwise as will produce revenue for the maintenance and support of the trust committed to it.

In *Alabama v. Schmidt*, 232 U. S. 167, 58 L. ed. 555 (1914), the Court considered the nature of titles created by grant to a state by Act of Congress for the "use of schools." In the present instance the grant being for "public purposes" is broader even in its terms than such grants as were considered in the *Schmidt* case.

With reference to such grants the Supreme Court of the United States, speaking through Mr. Justice Holmes, observed:

"As long ago as 1856 it was decided 'the trusts created by these compacts relate to a subject certainly of universal interest, but of municipal concern, over which the power of the state is plenary and exclusive;' and it was held that the State of Michigan could sell its school lands without the consent of Congress. *Cooper v. Roberts*, 18 How. 173; 15 L. ed. 338. This decision adverted to the fact that it had been usual for Congress to authorize the sale of lands if the State should desire it, but suggested that it was unnecessary (which, indeed, followed from what was decided) and thus met the further argument here pressed that a qualified permission to sell was given to Alabama by a much later Act *** **The gift to the state is absolute**, although, no doubt, as said in *Cooper v. Roberts*, 'there is a sacred obligation imposed on its public faith.' But that obligation is honorary, like the one discussed in *Conley v. Ballenger*, 216 U. S. 84 *** and even in honor would not be broken by a sale and substitution of a fund as in that case; a course, we believe, that has not been uncommon among the states. See further *Stuart v. Easton*, 170 U. S. 383-394." (Emphasis supplied.)

See also *Magnolia Petroleum Company v. Price*, 86 Okla. 105, 206 P. 1033, affirmed 267 U. S. 415, 69 L. ed. 272.

I am of opinion, therefore, that the title of the State of Alabama in and to the Mount Vernon Barracks Military Reservation, while held in trust for public purposes is nevertheless a title in fee simple absolute and not subject to forfeiture or to any condition subsequent.

After the grant of this land was made by Congress to the State for public purposes in 1895 the legislature, by Act No. 147, S. 4, approved December 11, 1900, (Acts 1900-1901, page 358) to incorporate the Alabama Insane Hospital, executed the trust reposed in the state by setting aside the property granted for "the use of the insane of the state, under the name of the Mount Vernon Hospital."

By Section 2 of said Act a board of seven trustees was created, with possession, control and management of said property and with power, among other things, to contract and be bound. Said Board of Trustees under their corporate name of the Alabama State Hospitals exercises a public governmental function. **White v. Alabama Insane Hospital**, 138 Ala. 479. Their power of control over the property in question is, in my opinion, broad enough to authorize them for and in the name of the State of Alabama, which still holds legal title to the property, to execute such contracts or leases, short of absolute sale or conveyance of the property itself, as may be beneficial in the execution of their trust. This would include, in my opinion, execution of a so-called gas and oil lease.

For answer, therefore, to your questions numbered 1, 2, and 3 I am of opinion:

1. Alabama State Hospitals has a right to execute a gas and oil lease on the Mount Vernon Property.
2. Execution of such lease will not vitiate the grant or afford any basis for the Federal Government to forfeit the State's title to the lands in question.
3. Already answered.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

October 20, 1944.

Hon. H. H. Kinney,

Judge of Probate,

Cullman County,

Cullman, Alabama.

Redemption—Minor children, heirs of owner, may redeem property sold for taxes within one year after disability is removed. Title 51, Section 303, Code of Alabama 1940.

Redemption—After expiration of three-year period of redemption infants entitled to redeem may do so by filing bill in equity.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of July 19, 1944, is as follows:

"On June 16, 1941 a certain piece of property assessed to Ethel Tennyson was sold for 1940 Taxes to Lonnie Rushing. Since that time, the said Ethel Tennyson has died leaving a husband and several minor children. The land has not been redeemed and the three (3) year redemption period expired June 16, 1944. I should like to propound the following questions to you concerning this property:—

"1. May a natural guardian of Ethel Tennyson's minor children redeem said property in the name of these children?

"2. If it is too late for the guardian of the minor children to redeem the property, may I legally execute a Tax Deed to Lonnie Rushing the purchaser of the property?

"3. After the minor children's disability of non-age is removed, will they have the right to redeem said land? If so, by what method and from whom?

"4. If the minor children may redeem the land after said disability of non-age is removed, what rights will Lonnie Rushing, holder of the Tax Deed, have concerning this land?

"May the legal guardian of Ethel Tennyson's minor children redeem said property in the name of these children?

"I shall appreciate your immediate attention to this matter."

Although it is not so stated in your inquiry, it is assumed that Ethel Tennyson, deceased, died before June 16, 1944, and within three years from the date that the property was sold for taxes.

It is my opinion that after the expiration of three years from the date of sale, the probate judge is required to execute a tax deed to the purchaser, but further that the infants referred to in your inquiry may redeem by filing a bill in equity.

Title 51, Section 276, Code of Alabama 1940, provides as follows:

"§ 276. Deed delivered to purchaser.—After the expiration of three years from the date of the sale of any real estate for taxes, the judge of probate then in office must execute and deliver to the purchaser, other than the state, or person to whom the certificate of purchase has been assigned, upon the return of the certificate and payment of a fee of one dollar to the judge of probate, a deed to each lot or parcel of real estate sold to the purchaser and remaining unredeemed, including therein, if desired by the purchaser, any number of parcels, or lots purchased by him at such sale; and such deed shall convey to and vest in the grantee all the right, title, interest, and estate of the person whose duty it was to pay the taxes on such real estate, and by the lien and claim of the state and county thereto, but it shall not convey the right, title, or interest of any reversioner or remainderman therein."

It has been held in **Roach v. State**, 148 Ala. 419, 39 So. 685, that the duty of the judge of probate, in delivering a tax deed to the purchaser after the expiration of three years from the date the property is sold for taxes, and when the property remains unredeemed and the certificate of purchase is returned, is ministerial only. Therefore, when the purchaser at the tax sale delivers his certificate of purchase to the probate judge three years after the date of the tax sale and the property remains unredeemed, the judge of probate must execute a tax deed to the purchaser under the provisions of Title 51, Section 276, Code of Alabama 1940. **Roach v. State**, 148 Ala. 419, 39 So. 685.

Title 51, Section 303, Code of Alabama 1940, provides as follows:

"§ 303. Time and by whom land may be purchased.—Real estate which hereafter may be sold for taxes and purchased by the state may be redeemed at any time before the title passes out of the state, or if purchased by any other purchaser, may be redeemed at any time within three years from the date of the sale by the owner, his heirs or personal representatives, or by any mortgagee or purchaser of such lands, or any part thereof, or by any person having an interest therein, or in any part thereof, legal or equitable, in severalty or as tenant in common, including a judgment creditor, or other creditor having a lien thereon, or on any part thereof; and an infant or insane person entitled to redeem at any time before the expiration of three years from the sale, may redeem at any time within one year after the removal of his disability; and such redemption may be of any part of the lands so sold, which includes the whole of the interest of the redemptioner. If the mortgage or other instrument creating a lien under which a party seeks to redeem is duly recorded at the time of said tax sale, the said party shall, in addition to the time herein specified, have the right to redeem said real estate sold, or any portion thereof, covered by his mortgage or lien, at any time within one year from the date of written notice from the purchaser of his purchase of said lands at tax sale, served upon such party, and notice served upon either the original mortgagee or lien holder of their transferee of record, or their heirs, personal representatives, or assigns, shall be sufficient notice."

The above quoted Section provides that the owner or his heirs, or any person having an interest in the land may redeem the land sold for taxes to a purchaser other than the State at any time within three years from the date of the sale. However, the statute further provides that infants "entitled to redeem at any time before the expiration of three years from the sale" may redeem the property "within one year after the removal of his disability." From the facts stated in your inquiry, the minor children of Ethel Tennyson upon her death within the three year period were her heirs, and being the heirs of Ethel Tennyson were persons entitled to redeem within the three year period. These minors, therefore, have an extended time to redeem the property under the provisions of Title 51, Section 303, Code of Alabama 1940. This time is an indefinite period and expires one year after the minor children reach their majority.

It seems to be generally held that where a minor has been given a statutory right to redeem from a tax sale within a specified time after attaining his majority, he is not limited to the period allowed after reaching majority in which to redeem, but he may redeem during his minority also. *Jones v. Collins*, 16 Wis. 595; *Curl v. Watson*, 25 Iowa 35, 95 Am. Dec. 763; *Witt v. Me-whirter*, 57 Iowa 545, 10 N. W. 890; *Crowley v. Spradlin*, 77 Ark. 190, 91 S. W. 181; *Seger v. Spurlock*, 59 Ark. 147, 26 S. W. 819; *Burel v. Baker*, 89 Ark. 168, 116 S. W. 181. See also 65 A. L. R. 582.

It is my opinion, therefore, that the minor children of Ethel Tennyson may redeem at any time during their minority and during the period of one year subsequent to their attaining their majority. It is unnecessary, therefore, for the disabilities of nonage to be removed in order that the children may redeem said land. If, however, the disabilities of nonage are removed, it would have the same effect as the children reaching their majority. Should such disabilities be removed, the minor children would still have one year within which the property could be redeemed.

Since the statutory period of three years has already expired and since the purchaser at the tax sale is entitled to a tax deed from the judge of probate upon proper request, it is further my opinion that the statutory method of redemption as provided in Title 51, Section 305, is inept. The right of redemption after the expiration of three years from the time that the property is sold for taxes depends upon facts and circumstances which would require the judge of probate to go beyond his records. It is my opinion, therefore, that in order to redeem, the minor children should file a bill in equity for the purpose of perfecting their right of redemption. 14 Quarterly Reports of the Attorney General, page 215. *Farmer v. Hill*, 240 Ala. 416, 199 So. 802. In the latter case personal representatives of a mortgagee sought to redeem lands purchased by the State at a tax sale after the lands had been deeded to another. In that case the mortgagee and his personal representatives had an extended right of redemption after the expiration of the three year period. The position of such mortgagee is analogous to the position of the minor children in the case outlined in your inquiry. In *Farmer v. Hill*, *supra*, the Supreme Court stated:

"A redemption under this statute does not question the validity of the tax sale, nor the title of the purchaser from the State. It proceeds on the theory of a defeasible title, subject to be divested by virtue of a statutory right of redemption in the mortgagee. Full relief calls for an adjudication of the facts upon which the right of redemption depends, a

divesting of the title of the purchaser upon redemption and a cancellation of his deed, lest thereafter it constitute a cloud on the title. The statutory proceedings for redemption before title passes to the purchaser by deed from the Judge of Probate or from the State, as purchaser at tax sale are inept. A court of equity alone has jurisdiction to render complete and adequate relief."

If a legal guardian is appointed for the children, he may file the bill in equity to perfect redemption, and if no guardian has been appointed, the infants may sue by their next friend. Title 7, Section 102, Code of Alabama 1940. See also Equity Rule 7.

It is unnecessary to state the rights of the purchaser and holder of the tax deed for the reason that if the minor children file their bill in a chancery court, that court will require that the redemptioner pay the proper amount to the purchaser.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

October 20, 1944.

Hon. J. W. Heustess, Clerk,

Board of Revenue,

Montgomery County,

Montgomery, Alabama.

Board of Revenue of Montgomery County may purchase for the office of the Sheriff a list showing alphabetical list of records of the county tax assessments.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your request for an official opinion, bearing date of October 5, 1944, is as follows:

"An alphabetical list made from the records of the County Tax Assessor's Office showing the assessed value of the real property, personal property and etc for the year 1944, and showing the address of the person to whom the property is assessed, has been compiled by the Cadden Advertising Agency of Montgomery, Alabama. This list is very useful and

convenient to the Sheriff in approving bonds and in the collection of executions. This list saves the Sheriff and Jailer much time and work in securing ready information at the needed time, which is often at hours of the day and night, including Sunday and legal holidays, when the Tax Assessor's Office is not open and thereby not available to the Sheriff in the timely performance of his duties of approving bonds.

"In view of Section 123, Title 12, of the Code of 1940 and Local Act number 306, page 193, of the Local Acts of Alabama of 1915; and, on account of this list being so helpful to these officials in the timely performance of their duties in approving bonds and etc, is the expense of providing this list for these officials authorized, when the request therefor has been made to the Board of Revenue, and it has determined that said list is necessary for the timely conduct of the business of said county.

"Your usual prompt attention and official opinion on the above subject will be greatly appreciated by the Board of Revenue of this County."

In my opinion your inquiry should be answered in the affirmative.

On March 30, 1944, this office held that Colbert County could legally purchase a list showing in numerical order automobile licenses issued in said county, for the convenience and use of the offices of the Judge of Probate and Tax Collector. See Quarterly Report of the Attorney General, Volume 34, page 84.

In addition to the above, Local Act No. 306, Acts of 1915, page 193, provides as follows:

"Section 1. That the board of revenue of Montgomery county is hereby authorized and empowered to furnish the several offices of the county with equipment and **conveniences**, including janitor service and telephone service, as may in the discretion of the board be necessary or proper for the conduct of the public business of said county." (Under-scoring supplied.)

In view of the above, the Board of Revenue of Montgomery County is authorized to purchase the described list under the provisions of either Section 132, Title 12, Code of 1940, or said Local Act.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

October 21, 1944.

Hon. J. W. Heustess, Clerk,

Board of Revenue, Montgomery County,

Montgomery, Alabama.

Local Acts 1939, page 39—Montgomery County—County Engineer
—Code 1940, Title 12, Section 11, Title 23, Section 43—

The county engineer of Montgomery County is authorized with the approval or by the authority of the county governing body to make such contracts for the services of the Transportation Bureau of the Chamber of Commerce as said governing body may deem necessary for the efficient discharge of its duties with reference to the construction or maintenance of public roads.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of October 17, 1944, is as follows:

"Please advise this County whether or not its County Engineer, appointed and acting under authority of Local Acts of 1939 at pages 39 and 40, can employ the Transportation Bureau of the Chamber of Commerce of this City to audit freight bills, counsel and advise this County concerning freight rates on gravel and represent this County in freight rate hearings before rate advisory boards.

"Your usual prompt attention and official opinion on the above subject will be greatly appreciated."

County governing bodies have original jurisdiction in relation to the establishment, change, or discontinuance of roads and are declared to be "courts of unlimited jurisdiction and powers as to the construction, maintenance, and improvement of the public roads, bridges and ferries, *** except as their jurisdiction or powers may be limited by the local or special statutes of the state, *** and may make and enter into such contracts as may be necessary, or as may be deemed necessary or advisable by such courts or boards, to build, construct, make, improve, and maintain a good system of public roads, bridges, and ferries *** ." Code 1940, Title 12, Section 11, Title 23, Section 43.

In the exercise of such jurisdiction they have implied powers, and necessarily so, for the reason that no legislative body can foresee or expressly provide in advance for all powers necessary or essential to the execution of their express powers.

As an example of implied powers it was held in **Ensley Motor Car Company v. O'Rear, Treasurer**, 196 Ala. 481, 71 So. 704, that a county was authorized to purchase a motor car to be used in connection with the inspection of

public roads. Said the court, quoting from *Smith v. McCutchen*, 146 Ala. 455, 41 So. 619.

"Incidental to the power to build roads, bridges, jails, hospitals and courthouses is the implied power in the board or court to properly inform themselves and to protect the county by the employment of engineers and architects accustomed to such construction that the needed facility may be the better construed and adapted and the general public thus the better served."

I am of opinion, therefore, that the governing body of Montgomery County, is authorized to contract through its county engineer for the expert services of the Transportation Bureau of the Chamber of Commerce to audit freight bills and to counsel and advise the county with respect to freight rates on gravel used in the construction and maintenance of public roads and to represent the county in freight rate hearings before rate advisory boards, provided the county governing body deems such services to be necessary and essential to the efficient discharge of its duties with respect to such roads.

It should be added that the local act to which you refer, Act No. 76, H. 202, approved March 1, 1939, (Local Acts 1939, page 39) does not, in my opinion, operate to impair or affect the county governing body's jurisdiction and authority, and that the county engineer required by said Act to be employed by the county should not enter into any contracts with the Transportation Bureau of the Chamber of Commerce for its services without the express authority or approval of the governing body.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

October 25, 1944.

Mrs. Jewell L. Westbrook,

Clerk of the Circuit Court,

Marengo County,

Linden, Alabama.

Trial Tax—Disaster Loan Corporation, Federal instrumentality, not required to pay trial tax. Title 51, Section 20, Code of Alabama 1940. Title 15, U. S. C. A., Section 610.

Opinion by Assistant Attorney General Sykes.

Dear Madam:

Your request for an official opinion, bearing date of October 20, 1944, is as follows:

"I have a number of cases on the docket by the Disaster Loan Corp., A Corporation Created Under The Laws Of The United States of America and Having Its Principal Place of Business In The City Of Washington, District Of Columbia, which is a part of The Federal Government and I would like to know if a Trial Tax would be chargeable in these cases as part of the cost.

"Would appreciate an early reply to the above question as to whether a Trial Tax would be collected in each case or not."

In my opinion the trial tax of \$3.00 provided for in Title 51, Section 20, Code of Alabama 1940 cannot be imposed upon the Disaster Loan Corporation. Title 51, Section 20 of the 1940 Code of Alabama provides that "a trial tax of three dollars is imposed in each case, civil, criminal and equity, which is docketed in any circuit court in this state, to be taxed and collected as other costs, *** "

This office has previously held that this amount collected is not an item of cost but is a tax or revenue matter, Biennial Report of the Attorney General, 1936-38, page 82, and that certain Federal instrumentalities are exempt from the payment of said tax. Biennial Report of the Attorney General, 1934-36, page 711 (National Banks); Biennial Report of the Attorney General, 1936-38, page 690 (Reconstruction Finance Corporation); Quarterly Report of the Attorney General, January-March, 1939, page 235 (Home Owners Loan Corporation).

It is further provided in Title 15, U. S. C. A., Section 610, as follows:

" *** The corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation now or hereafter imposed by the United States, *** or by any state, county, municipality, or local taxing authority; except that any real property of the corporation shall be subject to State, *** taxation to the same extent according to its value as other real property is taxed. The exemptions provided for in the preceding sentence with respect to taxation (which shall, for all purposes, be deemed to include sales, use, storage, and purchase taxes) shall be construed to be applicable not only with respect to the Reconstruction Finance Corporation but also with respect to *** (3) the Disaster Loan Corporation. *** "

It is my opinion, therefore, that since the Disaster Loan Corporation is a Federal instrumentality and exempted from State taxation under the provision of the Act of Congress above quoted, trial tax cannot be imposed on such agency.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

October 25, 1944.

General George L. Cleere,

Adjutant General,

State Military Department,

Montgomery, Alabama.

Automobiles—Exemption from Privilege Tax and Registration Fees
—Commissioned Officers in Active Alabama National Guard.

1. Commissioner officers in Active Alabama National Guard of Alabama after induction into the Army of the United States are still entitled to the exemption granted by Title 35, Section 101, Code of Alabama, 1940.

2. Exemption from payment of such privilege license or tax of commissioned officers in the Active Alabama National Guard of Alabama, who have been reverted to inactive status on account of physical disability, is discussed generally.

3. Non-commissioned officers and enlisted men who were members of the Active Alabama National Guard of Alabama and have received commissions after the induction of the National Guard into the Army of the United States are not entitled to such exemptions.

4. Members of the naval militia of the State who now hold commissions in the United States Navy not entitled to such exemption.

Opinion by Acting Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of October 24, 1944, is as follows:

"It is requested that an official opinion be rendered this office as to those officers who were officers in the Active National Guard prior to their induction into the Army of the United States, in so far as exemption from payment of privilege tax and registration fees on automobiles owned by such officers is concerned.

"Your attention is directed to Title 35, Section 101, Code of Alabama 1940, which grants this exemption to the commissioned officers of the Active National Guard of Alabama.

"Your opinion is also requested on the status of those officers who were commissioned officers in the Active National Guard of Alabama, but on account of physical disability have been reverted to inactive status.

In some instances these officers still hold their commissions in the Active National Guard and in other instances their commissions have been terminated by the War Department.

"Please also give me your opinion as to the status of those persons, who were either enlisted men or non-commissioned officers in the Active National Guard but have received commissions in the Army of the United States since being so inducted. Are such persons entitled to the exemption here considered?

"Please also give me your opinion as to whether or not those members of the Naval Militia of the State of Alabama who now hold commissions in the United States Navy are entitled to the exemptions set forth in Section 101, *supra*."

This office in an opinion addressed to Mrs. Edna N. Dunn, Judge of Probate, Conecuh County, Alabama, under date of December 16, 1943, Quarterly Report, Attorney General, Vol. 33, p. 125 has answered your first inquiry. This opinion is to the effect that commissioned officers of the Active National Guard of Alabama, when ordered into the armed services of the United States are still entitled to exemption from the State privilege tax and registration fees on automobiles. However, it is to be noted from this opinion that it only applies to commissioned officers of the Active National Guard who were commissioned officers in the National Guard prior to their induction into the army of the United States. A copy of this opinion is enclosed for your convenience.

In answer to your second inquiry as to the status of those officers who were commissioned officers in the National Guard of Alabama, but on account of physical disability have been reverted to inactive status, you are advised as follows:

(A) Officers who have been reverted to inactive status but still hold their commissions in the National Guard of Alabama, in my opinion are entitled to exemption from the payment of privilege license and registration fees on their automobiles.

(B) Officers who were formerly commissioned officers in the Active National Guard and have been reverted to inactive status and whose commissions have been terminated by the War Department are not entitled to the exemption, because they are no longer commissioned officers either in the Active National Guard of Alabama, or in the Army of the United States. Their present status is the same as that of any other private individual in the State. The fact that they were once entitled to the exemption does not operate as a basis of exemption after they cease to be commissioned officers in the Active National Guard of Alabama.

It is my opinion that your third inquiry should be answered in the negative.

Title 35, Section 101, Code of Alabama 1940, which grants this exemption to the commissioned officers of the Active National Guard of Alabama, reads as follows:

"Section 101. Exemption from state toll bridge and tunnel fees; and automobile license fees.—Under such rules and regulations as may be drafted by the military and advisory board of the state, and approved by the governor, individual officers, warrant officers, and enlisted men of the national guard and the naval militia of this state, and individual officers, warrant officers, and enlisted men of the United States army or navy on duty with the national guard or naval militia of this state and detachments and units of such of the land and naval forces of this state or the United States as may be specifically mentioned in such regulations or in special orders issued by the governor, may be exempted from the payments of toll bridge and tunnel fees within the state. **There shall be exempted from the operation of the privilege or license tax and registration fee now or hereafter to be levied on automobiles and motor vehicles within the State of Alabama, passenger vehicles owned and operated by the Federal Government or by officers and enlisted men actually service in the United States army who are assigned by the War Department as Instructors or Sergeant-Instructors with the National Guard of Alabama and all commissioned officers of the Active National Guard of Alabama.** Such vehicles shall be properly identified with tags or plates issued by the proper department of the Federal Government or by the commanding officers of the Army or National Guard having jurisdiction in the premises; and upon presentation of such proper identification to the county officials of the county in which said vehicle is ordinarily kept or stored said official of the State of Alabama shall issue a license tag to be attached to said vehicle, without, however, charging the usual fees for registration or licensing of said vehicles."

It is to be noted that the exemption from payment of such privilege or license tax is granted to all commissioned officers of the Active National Guard of Alabama. Before a person will be entitled to this exemption he must have been a commissioned officer in the Active National Guard of Alabama prior to his induction into the army of the United States. After the induction of the National Guard of Alabama into the Army of the United States there was no organization known as the "Active National Guard of Alabama." The fact that certain enlisted men or non-commissioned officers who were in the Active National Guard prior to its induction into the United States Army have now received commissions in the army of the United States would not entitle these persons to such exemptions. To entitle a person to the exemptions here considered he must have been a commissioned officer in the Active National Guard of the State of Alabama prior to its induction into the army of the United States.

You are therefore advised that those enlisted men and non-commissioned officers who have since the induction of the Active National Guard of Alabama into the army of the United States received commissions in the army of the United States are not entitled to the exemptions granted by Section 101, *supra*.

It is my opinion that members of the naval militia of the State of Alabama who now hold commissions in the United States Navy are not entitled to the exemptions here considered.

It is to be noted from Section 101, *supra*, that the only exemptions granted to the naval militia of the state is the exemption to such persons from the payment of toll bridge and tunnel fees within the State of Alabama. No

mention is made of exemptions to the naval militia of the state from payment of automobile privilege or registration fees. In the absence of such exemption it is plain that those persons are not entitled to exemptions by the fact they now hold commissions in the United States Navy.

Any opinion of this office whether formal or informal which reaches a conclusion other than herein above announced is hereby expressly overruled and withdrawn.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

October 27, 1944.

Hon. Ben C. Morgan,

Director of Conservation,

Montgomery 4, Alabama.

NAVIGABLE WATERS—

OWNERSHIP AND JURISDICTION VESTED IN ALABAMA IN TRUST FOR THE CITIZENS OF THE UNITED STATES SUBJECT TO CONSTITUTIONAL RIGHT OF FEDERAL NAVIGATION.

1. The State owns the navigable waters and beds thereof in this state and holds the same in trust for the citizens use, subject only to the constitutional right of the United States to use the same for navigation.

2. The State may in the exercise of its police powers regulate the manner of fishing in said waters.

3. The Act of Congress Creating the Tennessee Valley Authority does not interfere with or attempt to supersede this ownership or jurisdictional right.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for an official opinion, bearing date of October 21, 1944, is as follows:

"We are having considerable trouble from the Courts regarding the

jurisdiction of the State of Alabama over the waters of the Tennessee River, claiming that the State ceded jurisdiction over these waters to the Tennessee Valley Authority.

"The TVA officials recognize the right of the State of Alabama to control fishing in the streams in all these impoundments and have so stated.

"Please advise me if in your opinion the Department of Conservation has police jurisdiction over the waters in these impoundments.

"This is a very important matter. We have had cases thrown out of Court and I would appreciate an early opinion.

"Attached is copy of letter from one of our District Supervisors stating the facts in these cases."

Some well-established fundamental principles answer your question in the affirmative.

By the terms of the admission of Alabama into the Union this state became the owner of the navigable waters and beds thereof in this state to be held in trust for the use of the citizens of the state and the United States. The only limitation on this ownership and use is that it is subject to the constitutional authority of the United States to use the same for navigation. Subject solely to this limitation the state has full power to legislate, under its police power, concerning the use of navigable waters. **Constitution of Alabama 1901**, Section 24; **City of Mobile v. Eslava**, 9 Port. 577., 16 Pet. 234; **Mobile Transp. Company v. City of Mobile**, 187 U. S. 479; 45 C. J. pages 421-424, Section 20(b).

It is conclusively settled by a long line of authorities that the state may legislate upon any subject it deems proper so long as the legislation does not infringe upon some constitutional provision of the state or federal governments. Citation of one authority on this long-recognized principle will suffice. **Dorman v. State**, 34 Ala. 216.

There are no constitutional provisions, state or federal, that inhibit the state from passing a law creating the Department of Conservation incorporated in the Code of Alabama, Title 8, Sections 1-171.

Section 17 of the title vests power in the director of the Department "to regulate the manner, means and devices for catching or taking game fishes, game birds, game and fur bearing animals and the manner, means and devices for catching or taking all other species of fish not designated as game fish."

Section 19 of this title confers power on the game warden to enforce all the laws relating to fish and fishing, and to confiscate the fish taken at a time and in a manner contrary to the Act.

Section 66 of this title makes it unlawful to catch fish by any other means than ordinary hook and line, fly, troll, spinner or substitute therefor.

Section 71 of this title prohibits the use of nets in all artificially empounded waters of the state.

It is so well known that the Tennessee River is a navigable stream that it is unnecessary to enter into discussion thereof or cite authorities in support of the proposition. Moreover, if it were purely a non-navigable stream the federal government would have no jurisdiction over it for any purpose.

Your letter indicates that it is being claimed that the state ceded jurisdiction over the water of the Tennessee River falling within the area of the Tennessee Valley Authority. The Tennessee Valley Authority was created and granted powers by an Act of Congress, and the state, of course, had no connection with the passage of the law. The state cedes jurisdiction by some legislative enactment and it has not done so in this case. Moreover, it is not conceivable that the legislature could cede its jurisdiction over navigable waters of this state that is held in trust for the citizens' fee use forever.

The Act creating the Tennessee Valley Authority nowhere makes any attempt to vest it with the state's jurisdiction over its waters. No mention, expressly or impliedly, is made justifying such conclusion.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

November 4, 1944.

Hon. J. W. Heustess, Clerk,

Board of Revenue,

Montgomery County,

Montgomery, Alabama.

Montgomery County—License Inspector—Automobiles—
Board of Revenue of Montgomery County authorized to purchase
and maintain automobile for use of license inspector.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of October 17, 1944, is as follows:

"The Board of Revenue of this County is sure that it would be a good investment for the treasury of this County to own and operate an automobile for the License Inspector of this County. Please advise this Board whether or not it has the authority to furnish and maintain an automobile for the more efficient operation of license inspection work in this County.

"Your usual prompt attention to the above subject will be greatly appreciated by the Board of Revenue of this County."

It is my opinion that the Board of Revenue of Montgomery County is authorized to furnish and maintain an automobile for the use of the license inspector.

Local Acts 1939, page 259, approved September 15, 1939, provides as follows:

"Section 1. That the Board of Revenue or other governing body of like jurisdiction of Montgomery County, Alabama are hereby authorized and empowered to appropriate out of any monies in the county treasury not otherwise appropriated and to expend not exceeding the sum of seven thousand dollars per annum for any county purposes not otherwise provided for by law that in their judgment are worthy and for the interest of the county, the fund hereby authorized to be created to be known as the 'Contingent Fund.'"

In an opinion of this office, dated March 25, 1939, addressed to Hon. B. P. Singleton, State Comptroller, 14 Quarterly Reports of Attorney General, page 233, this office had under consideration a general act of local application, authorizing certain counties to expend seven thousand dollars per annum "for any county purposes not otherwise provided by law that in their judgment are worthy and for the interest of the county ***." See General Acts 1931, page 550. It was decided in that opinion that this general act of local application (General Acts 1931, page 550) authorized the Board of Revenue of Montgomery County to purchase an automobile and pay the expense of operating the same for the license inspector. This general act of local application was expressly repealed by General Acts 1939, page 116, but the Local Act (Local Acts 1939, page 259, approved September 15, 1939) so far as authorizing the Board of Revenue of Montgomery County to purchase an automobile and maintain same for the use of the license inspector supplies the authority that was taken away by the repeal of the general act of local application, *supra*.

It is my opinion, therefore, that if the purchase and maintenance of an automobile for the use of the license inspector is, in the judgment of the Board of Revenue of Montgomery County, worthy and for the interest of the county such automobile may be purchased by the county out of the contingent fund.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

November 6, 1944.

Hon. Wm. J. Kern, Clerk,

Inferior Criminal Court,

Mobile County,

Mobile, Alabama.

Inferior Criminal Court of Mobile County—Clerk, sheriff fees for issuing and serving notice of scire facias.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of August 26, 1944, is as follows:

"Please give me your opinion with respect to the following: Provision of Title 15, Sec. 214, 1940 Code; *Cit. Hatch-v-State*, 40 Ala. 718; *State-v-Hinson*, 4 Ala. 671, 673; suit on forfeited undertaking is a Civil not a criminal action. I, as Clerk of the Inferior Criminal Court of Mobile County issue notices to the defendant and sureties returnable in the required thirty days to show cause why the conditional judgment against them should not be made final. Are these notices to be construed as Complaint and Summons and as such, the fees to be taxed \$1.00 for issuing complaint and summons and \$1.30 for serving the same (the latter, Sheriff for Mobile County); or should they be the same as Criminal Court fees, \$.25 for issuing State Subpoena and \$.50 for serving State Subpoena? Inferior Criminal Court and Inferior Civil Court schedule of fees are the same as Justice of the Peace fees. Since the jurisdictional limitation of judgments in the Inferior Civil Court of Mobile is one hundred dollars, how would this affect the judgment against these defendants where the bond is in excess of one hundred dollars?"

It is my opinion that the Clerk of the Inferior Criminal Court of Mobile County is entitled to a fee of 25 cents for issuing a notice of scire facias under the provisions of Title 15, Section 214, Code of Alabama 1940, and that the sheriff is entitled to a fee of \$1.50 for serving such notice under the provisions of Title 11, Section 34 of the Code of Alabama 1940.

The Inferior Criminal Court for Mobile County was established by an Act of the Legislature approved February 23, 1899 (Acts 1899, page 1164). This Act has been amended by Local Acts 1907, page 82, Local Acts 1927, page 329 and page 66, and also by Local Acts 1932, Extra Session, page 34. See also Local Acts 1933, Extra Session, page 29; Local Acts 1936-37, Extra Session, page 3.

It has been held by an opinion of this office, 21 Quarterly Report of the Attorney General, page 140, that courts having criminal jurisdiction have au-

thority to do those things which are necessary to effectuate that jurisdiction, including the forfeiture of a bail bond.

The Local Act establishing the Inferior Criminal Court in the County of Mobile, as amended by Local Acts of 1907, page 82, and Local Acts 1927, pages 329, 330, provides in part as follows:

"For all the services rendered in the said court the said clerk shall receive an annual salary of twenty-four hundred dollars payable monthly from the county treasury of Mobile County, and he shall receive no fees whatever. It shall be the duty of said clerk to assess and collect in each criminal case all the costs, fines and fees provided for under the laws of Alabama for justices of the peace, and such monies so collected shall by him be paid into the treasury of Mobile County."

It is apparent from the above quoted amendment that the clerk should assess and collect justice of the peace fees in criminal cases.

Although it has uniformly been held that proceedings for the forfeiture of a bail bond is a civil action distinct from the original case which is usually criminal, *Ex Parte Moore*, Supreme Court of Alabama 1942, 12 So. (2d) 77; *Jones v. City of Opelika*, Supreme Court of Alabama 1941, 4 So. (2d) 509; (see also *Hatch v. State*, 40 Ala. 718 and *State v. Hinson*, 4 Ala. 671), it is my opinion that the Local Act as amended (Local Acts 1927, pages 329, 330) contemplates that the Clerk of the Inferior Criminal Court of Mobile County assess and collect the fees allowable to justices of the peace as set out in Title 11, Section 96, Code of Alabama 1940. In fact Section 6 of the Local Act of 1907 (Local Acts 1907, page 86) provides:

"That the same costs shall be taxed and collected in the said inferior criminal court, and in the same manner as is provided by sections 4574, 4575, 4576, and 4577 of the Code, ***."

The Code referred to above was obviously the Code of 1896 and Section 4574 now appears as Title 11, Section 96, Code of Alabama 1940.

Title 11, Section 96 provides that a justice of the peace is entitled to 25 cents for "issuing each subpoena or notice." It should be noted that this section also provides for a fee of 50 cents "for each judgment on forfeited bond or undertaking."

It is my opinion, therefore, that when the Clerk of the Inferior Criminal Court of Mobile County issues a notice of scire facias under the provisions of Title 15, Section 214, he should assess and collect the same fee (25 cents) that a justice of the peace would collect for issuing a "subpoena or notice." Title 11, Section 96, Code of Alabama 1940.

The provisions of the Act establishing the Inferior Criminal Court of Mobile County, as amended by Local Acts 1932, Extra Session, page 34, provides:

"Section 14: Be it further enacted that the said judge or clerk of the said Inferior Criminal Court shall address all processes of whatever nature or kind to the Sheriff of Mobile County who shall either himself or by deputy execute the same. When required by the said Judge the said

Sheriff shall furnish a bailiff for the said Inferior Criminal Court. The sheriff shall receive and be paid as compensation for the services required of him and for furnishing the bailiff, the same fees prescribed for the sheriff by the general law for the performance of such services."

The fee prescribed by the general law for the sheriff serving a scire facias is \$1.50. Title 11, Section 34, Code of Alabama 1940. 14 Quarterly Report of Attorney General, page 268. Biennial Report of Attorney General, 1930-32, page 243.

The jurisdictional limitation on judgments in the Inferior Civil Court of Mobile County has no relation to your inquiry.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

November 9, 1944.

Hon. Travis H. Johnson, Treasurer.

Walker County,

Jasper, Alabama.

Constitution 1901, Sec. 215 (a)—Title 12, Sec. 186, 1940 Code—Walker County—Board of Revenue.

Where there are existing county debts, evidenced by outstanding bonds, created for road, bridge, and building work, and the governing body of the county has levied the 1/4 of 1% special tax under Section 215 (a) of the Constitution for payment thereof, the county cannot apply the proceeds of the levy to the payment of contemplated debts or liabilities for future work of the kind named in the Constitution and statutes, or future debts of the county for any other purpose.

Opinion by Assistant Attorney General Cooper.

Dear Sir:

Your request for an official opinion, bearing date of November 2, 1944, is as follows:

"Re: Tax Levy for payment of Bonded indebtedness Special Tax of 2½ mills for the payment of debts heretofore made for roads, bridges and buildings as provided for in the 1901 Constitution Section 215 Sub-section A.

"The Minutes of the Walker County Board of Revenue, of Walker County, dated Feb. 5, 1943, and recorded at page 61 of Minute book #5, read in part and by complete paragraphs as follows:

"Whereas the law designates the "Feb. Term" of the Board of Revenue of Walker County as the time for making the tax levy for County Purposes:'

"Therefore, be it resolved, that there be and is hereby levied on all taxable property in the County of Walker for the tax year 1943 as follows; namely:'

"2. A special tax of 2½ mills or 25 cents on each \$100.00 worth of taxable property in said county authorized by Section 215, subsection (A) of the 1901 Constitution of Alabama for the payment of debts heretofore made for Roads, Bridges, and Buildings to be paid when collected by the Tax Collector into the County Treasury to the credit of the Special Road, Bridge and Building fund to pay debts.'

"The minutes of the Walker County Board of Revenue, dated Feb. 5, 1944, and recorded at page 232 of Minute Book #5, reads substantially as quoted above.

"Walker County owes \$250,000.00 for 5% Road Bonds sold in Jan. of 1915, and will mature Jan. 1st 1945. We now have \$80,000.00 on deposit in Banks or invested in U. S. Govt. Bonds that has been earmarked 5% Road Bond Sinking fund and to be used for the purpose of retiring said bonds at maturity. There is \$30,508.00 in the Special Road, Bridge and Building fund as of Sept. 30, 1944, and we expect to collect between \$20,000.00 and \$25,000.00 between Oct. 1, 1944 and Dec. 31, 1944. Special tax for purpose stated above.

"Question: Can tax money so levied and collected be used for any other purpose (such as, purchase of New Machinery, repair and maintenance of machinery, building or maintaining roads, set aside for Post War planning etc.) other than to be used for the retirement of debts that now exist? Walker County cannot retire all of the \$250,000.00 which matures Jan. 1, 1945, but will have to refinance a portion of said obligation.

"Your prompt attention to this matter will be greatly appreciated."

Your inquiry must be answered in the negative.

The constitutional and legislative authority for levying the special tax of 2½ mills for the years 1943 and 1944, without which the county would be powerless to act in the premises, provides expressly the following: "Which taxes so levied and collected shall be applied exclusively to the purposes for which the same are so levied and collected." **Section 215, Constitution of 1901; Title 12, Section 186, 1940 Code.**

Walker County's governing body, for the years 1943 and 1944, by resolution levied the special tax "for the payment of debts heretofore made for roads, bridges, and buildings"; to be paid into a special fund, when collected, for that purpose. Mandamus would lie to compel the application of the pro-

ceeds of the tax to the purpose for which they were levied. **Board of Revenue of Shelby County vs. Farson**, 197 Ala. 365, 72 So. 613. In that case the court said:

“ *** It is insisted that the question of levying the special tax **and of the purpose for which the same shall be applied** is a matter resting in the discretion of the board of revenue or commissioners' court, and cannot be controlled by the writ of mandamus. We are of the opinion, however, that as the commissioners' court had full power to enter into the contract and agree to levy this special tax for this particular purpose, and that as such agreement is valid and binding and a most material part of the contract, it became the legal duty of the court to levy the tax and have the money so collected appropriated to the purpose for which it was pledged. The contract being binding, the question passed beyond the field of discretion and became one of plain duty to carry out the agreement solemnly made. While it is true that the language of the Constitution, as well as of the statute, says that the commissioners' court may levy the tax, yet, having bound themselves by valid agreement to levy the tax, the clear legal duty arises to conform to that agreement, and mandamus is the proper remedy *** ” (Underscoring Supplied)

The funds realized from these levies cannot be used for general county purposes, **Ramage, Parks and Company vs. Folmar**, 215 Ala. 661, 108 So. 580, although the general funds of the county can be used for road, bridge or building purposes. **Phillips vs. Atkins, et al.** 229 Ala. 15, 155 So. 537.

Under other circumstances the governing body of the county would be authorized to levy the special tax to meet debts and liabilities which might arise out of future road, bridge, and building work. **So. Ry. Co. vs. Cherokee County**, 144 Ala. 579. But where such work has already been done; the debts created and liabilities incurred; and the tax levied for the payment of the same, the governing body is without legal authority, in my opinion, to apply the proceeds of such tax to contemplated debts or liabilities for future work of the kind named in the Constitution and the statute—certainly not to any future debt or liability for any other purpose.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

November 13, 1944.

Hon. Roy Johnson,

Tax Assessor,

Jefferson County,

Birmingham, Alabama.

Code 1940, Title 51, Sections 53, 63—Assessment of Taxes—Owner Unknown—

If after diligent inquiry the tax assessor is unable to discover the owner of real estate which has escaped assessment for the current year and for any year prior thereto for the last five years he should assess such real estate to "owner unknown" for the current year, and for five years next prior thereto, provided such real estate has not been bid in for the State at a taxsale at any time prior to such assessment.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of November 7, 1944, is as follows:

"About two years ago I discovered that a forty-acre tract of land in this county had been marked state-owned property since the 1880's. However, the person who was interested had ascertained that it was not state property, and it was marked that way erroneously in the 1880's and an escape assessment was made against it and this man bought it in.

"When I found that this condition existed, I began to check my records, and found that there was probably a thousand acres of cut-over timber land from which the mineral had been removed, leaving only a shaly hillside and washed-out gullies in which no one was interested. I have written each department of the state which has to do with state-owned lands, and also to the university. All of them disclaim any ownership to the property, and I, therefore, would like to know, since I can find no person who ever owned the property, if I should not assess it as 'owner unknown,' make an escape assessment for a reasonable amount for the five years back and for the current year, and let it be bought in by some individual or the state. If selling property as 'owner unknown' is not the legal way to do it, we might find some person whose property either adjoins it or who might be interested in the property and assess it in his name for five years back, and let him pay up the taxes. In any case, the property is practically worthless, but it should not be marked state property when it is not.

"I don't believe I have ever had to handle anything of this nature before, and I would like to have your best advice in the matter."

From the foregoing it appears you have made diligent inquiry as required by Code 1940, Title 51, Section 60, to discover the owner of the lands in question, including, I assume, search of the deed records in the office of the judge of probate, as well as all other investigation that would suggest itself to a prudent man. See opinion of Attorney General, August 26, 1940, to State Comptroller, **Quarterly Report Volume XX**, page 177; opinion October 28, 1940, to State Comptroller, **Quarterly Report Volume XXI**, page 113. I assume also you have been unable to find any record of sale of these lands to the State to satisfy unpaid taxes at any time in the past. Opinion of Attorney General, February 19, 1941, to Tax Assessor of DeKalb County, **Quarterly Report Volume XXII**, page 106.

I am of opinion, therefore, that the procedure first above suggested by you should be followed with reference to these lands, towit, you should assess them for taxation for the current year as required by Title 51, Section 60, and also for five years next prior thereto as required by Section 53, of Title 51.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

November 14, 1944.

Hon. Thomas A. Peavey,

Judge of Probate,

Escambia County,

Brewton, Alabama.

Code 1940, Title 12, §§ 43, 44—Counties—Depository in lieu of Treasurer—

County governing body in counties subject to Code 1940, Tit. 12, §§ 43 et seq. authorized to select bank in the county as depository in lieu of treasurer without stipulation for payment of interest on balances on deposit in depository, where payment of interest thereon is forbidden by federal law, upon such terms, including payment of service charges, as in the judgment of the governing body are for the best interest of the county.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of November 1, 1944, is as follows:

"Re: Escambia County, Ala.

"1. December 4th, first Monday in December, 1944, is the time for the governing body of Escambia County, Ala. to receive bids from banks within the county for appointment as County Depository; Please, therefore, give us your ruling and opinion on the question herein propounded to you.

"2. Title 12, Section 44, of the Code of 1940, provides that the Bank selected shall be the bank which offers the highest rate of interest to the County on daily balances, etc. which is now a 'dead letter' so far as said interest is concerned for the reason that all banks are prohibited from paying interest on public funds under the laws and rules governing the Federal Deposit Insurance Corporation of the U. S., and most or all of the counties have county depository banks that do not pay interest to the county.

"3. Can Escambia County select a bank within the County to act as County Depository whose bid provides,—that it is subject to all the rules and regulations now governing banks within the county or in the City of Brewton. There are three banks in the City of Brewton, the county seat.

"4. The meaning of such a bid is that the present rules governing the banks in the city of Brewton and throughout the county is that all depositors are treated alike; all depositors are required to pay three cents on all out of town checks; that service charges of small amounts would also be charged with reference to the number of checks drawn in certain categories and that each fund of the county would be kept separate and carried as a separate account for the county.

"5. It is now war times and the banks are loaded with expenses to aid the war effort in selling U. S. Bonds and cashing U. S. Bonds. The accounts of all depositors are heavy and loans are scarce and the banks expenses are high. We would like to avoid the heavy expense of employing some person to act as county treasurer under Title 12, Section 52 of the Code. Hoping that you can help us out and give us your reply as early as possible."

In the selection of county depositories to act in lieu of county treasurers the county governing body exercises a broad discretion. **Citizens Bank and Security Company v. Commissioners Court of DeKalb County**, 209 Ala. 646, 96 So. 778; **Mitchell v. Walden Motor Co.**, 235 Ala. 34, 177 So. 151.

Such depositories may be selected without agreeing to pay interest. Opinion of the Attorney General to the Judge of Probate of Talladega County rendered March 12, 1935, **Biennial Report 1934-36**, page 107.

It is to be noted also with reference to the payment of interest on daily balances that Code 1940, Title 12, Section 44 provides for the payment of interest on such balances "where permitted by law."

Inasmuch as banks are no longer, by reason of federal law, permitted to pay interest on such balances the payment of interest is, of course, no longer to be considered in selecting the depository.

This leaves for consideration the rules and regulations adopted presumably by all the banks in Escambia County as to payment of service charges. But in my opinion such rules and regulations do not affect the question because of the discretion vested in the county governing body in the matter of selecting a depository as declared in the DeKalb County case.

I am of opinion, therefore, that the governing body of Escambia County would be authorized to select as a depository some bank therein under the terms and conditions above stated in your request for this opinion.

The provisions of the original statute with reference to the payment of interest although in form mandatory were in the DeKalb County case nevertheless declared to be directory merely, upon a consideration of the statute in its entirety.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

November 14, 1944.

Hon. H. G. Dowling,

Commissioner of Revenue,

Department of Revenue,

Montgomery 2, Alabama.

Code 1940, Tit. 51, § 509—Licenses—Directories—

Code 1940, Tit. 51, § 509, imposes a license tax upon persons compiling and selling or offering for sale city or town directories. The tax is graduated in amount according to population of the city or town of which a directory is compiled and sold or offered for sale. It imposes no tax upon persons compiling and selling or offering for sale other kinds of directories.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of November 3, 1944, is as follows:

"Section 509, Title 51, Code of Alabama 1940, provides as follows, I quote:

"Each person compiling, selling or offering for sale directories shall pay to the state license taxes as follows: For each city or town of one hundred thousand inhabitants or over, one hundred and fifty dollars; in cities or towns of fifty thousand and less than one hundred thousand inhabitants seventy-five dollars; in cities or towns of twenty thousand and less than fifty thousand inhabitants, fifty dollars; in city and towns of less than twenty thousand inhabitants, fifteen dollars; provided that this section shall not apply to directories issued by any person in connection with or as a part of a business for which business a general license tax is provided."

"You will observe that the levying provision of the statute is general in its nature—'Each person compiling, selling or offering for sale directories shall pay to the state license taxes ***.' However, the provision of the statute which fixes the rate of taxation recognizes municipal units.

"Your attention is further called to the portion of the statute which fixes the rate of taxation—'For each city or town of one hundred thousand inhabitants or over, one hundred and fifty dollars:'—the other provisions of the portion of the statute which fixes the rates used a different clause —'in cities or towns.'

"The State Department of Revenue is in some doubt as to the manner in which the statute should be construed. This doubt is raised by the following questions:

"(1) Does the statute, as a whole, levy a license tax upon the compiling, selling or offering for sale a directory of any character except municipal directories?

"(2) Does the statute levy a tax upon the compiling, selling or offering for sale of every type of directory with the license tax measured by the number of inhabitants in the city or town in which it is compiled, sold or offered for sale?

"(3) If John Doe compiles, sells or offers for sale, from his place of business in a city of one hundred thousand inhabitants or over, a directory which is statewide in its scope, would he be liable for license taxes, if so, in what amount?

"(4) If John Doe compiles, sells or offers for sale a directory statewide in its scope and demand, would he be liable for license taxes, if so, in what amount?

"(5) If John Doe compiles, sells or offers for sale a directory of the owners of automobiles within the State of Alabama, the type of automobiles owned and the model thereof, would be liable for a license tax, under the provisions of the statute, if so in what amount?

"I will appreciate it if you will kindly give us an official opinion on the questions presented as soon as circumstances will permit."

The language of Code 1940, Title 51, Section 509, purporting to place a license tax upon the compiling, selling or offering for sale of directories, is so confusing and uncertain as to call for application of certain well-known rules

of construction. With reference to the drafting of acts of legislature it has been observed that apt words are not always used, that perspicuity and precision are not always observed by those who draft statutes, and that the whole statute under consideration must be sometimes considered to ascertain its true meaning and intent. **Broaddus v. Johnson**, 235 Ala. 314, 317, 179 So. 215; **Tennessee Coal, Iron and Railroad Company v. State**, 235 Ala. 152, 177 So. 905, 906.

It has also been said that courts in construing statutes often look less to the letter than to the context, the spirit and the meaning of the statutes, to arrive at the true intent of the lawmakers and that statutes are often drawn inartificially. **Broaddus v. Johnson**, *supra*.

Courts must confine themselves to construction of the law as it is and not attempt to supply defective legislation or otherwise amend or change the law under the guise of construction. Such construction should be adopted as appears most reasonable and best suited to accomplish the object of the statute. A construction which would lead to an absurdity ought to be rejected. 59 C. J. 944; **State v. Praetorians**, 226 Ala. 259, 146 So. 411; **McKissack v. McLendon**, 133 Ala. 560.

Also in ascertaining a dubious legislative intent weight will be given to the practical effect which a proposed construction will give. **Birmingham Paper Company v. Curry**, 238 Ala. 138, 140.

Finally it may be observed that where the meaning of a phrase in a revenue-raising statute is in doubt the true meaning must be determined from the context and the statute should not be extended or enlarged by the construction to embrace matters not specifically pointed out therein. 59 C. J. 1131-35, § 670; **Mead Corporation v. Commissioner of Revenue**, 116 Fed. 2d. 187

Another well-known rule of construction of revenue statutes is in case of doubt as to the true meaning or intent to resolve the doubt in favor of the taxpayer. 59 C. J. 1131, **State v. Coastal Petro. Co.** 240 Ala. 254, 198 So. 610.

Upon application of these rules of construction, I am of opinion that Section 509, Title 51, *supra*, was intended to impose a license tax only upon persons compiling and selling or offering to sell so-called municipal directories of cities and towns in the State of Alabama, and that the amount of license is to be determined by the population of the particular city or town of which a directory is compiled and offered for sale.

I am of opinion also that said section applies only to such directories and is without application to other kinds of directories, such as those state-wide in scope and demand, or directories of automobile owners throughout the state, showing the type of automobile and the model owned.

Answering your interrogatories numbered 1 to 5, inclusive, specifically, I am of opinion that the answer to each of them is "No," and I am of opinion also that it is immaterial in what size city or town the so-called municipal directories are sold. The amount of license tax to be paid will depend ex-

clusively on the population of the city or town of which the directories are compiled and also depends on whether or not such directories are sold or offered for sale.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

November 18, 1944.

Hon. Shirley Floyd, Mayor,

Town of Tallassee,

Elmore County,

Tallassee, Alabama.

Code 1940, Title 37, §§ 750, 758—Municipal Corporations—Licenses—

A person operating a dairy outside the police jurisdiction of a city or town who uses his own land and cattle for such purpose is, by reason of Code 1940, Title 37, Section 758, exempt from imposition of a license under Section 750, of said Title although for the purpose of marketing its products he operates vehicles on the streets of the city or town.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion bearing date of November 16, 1944, is as follows:

"The Town of Tallassee, Alabama assesses a license against all trucks, drays, etc., using the streets of the town for business purposes under and by virtue of Section 750, Title 37, Code of Alabama 1940. There are several dairies located outside of the police jurisdiction of the town, which deliver dairy products in the town by their trucks. These dairies produce milk and butter products from dairy herds maintained and kept on the farms of the operators of these dairies. The local dairies have raised the question as to whether or not they are liable for this license by reason of Section 758, Title 37, Code of Alabama 1940. They maintain that they are farmers delivering farm products in our town and therefore are exempted from the license under and by virtue of Section 758, supra. Will you please give us your opinion in the following question: Is a dairy located outside of the police jurisdiction of a municipality which owns its own cattle on this land exempted from payment of a municipal license authorized under Section 750, Title 37, Code of Alabama 1940 by reason of Section 758 of the same Title and Code?"

Sections 750 and 758, Title 37, Code 1940, must be taken and construed together as of equal dignity in such wise as to give each a field of operation. Both sections relate to the subject of licenses imposed by cities and towns. One section authorizes regulation and licensing of vehicles kept for hire and of the use of the streets of cities and towns by persons using vehicles to solicit or transact business thereon. On the other hand Section 758 forbids imposition of license taxes by cities and towns upon farmers or others engaged in the production of farm products of whatsoever nature for sale and other disposition, wherever produced.

There can be no question that milk and other dairy products are farm products when produced by farmers or dairymen, on their farms or at their dairies. **Opinion** of the Attorney General to Commissioner of Agriculture and Industries, January 10, 1933, (**Biennial Report 1932-34**, page 123).

Section 750, *Supra* is of broader scope than Section 758, and is subject, therefore, to limitation or qualification by the special provisions of the latter section. It may be observed also that use of the streets by farmers or others producing farm products, for the purpose of marketing or delivering their products is merely incidental to the sale or other disposition of such products.

I am of opinion, therefore, that a person owning and operating a dairy outside the police jurisdiction of a city or town, who owns the land and cattle used for such operation is, by reason of Code 1940, Title 37, Section 758, exempt from imposition of a license under Section 750 of said title, although for the purpose of marketing its products he operates vehicles on the streets of a city or town. To hold otherwise would practically nullify the exemption under Section 758.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

November 28, 1944.

Hon. M. W. Forman,

Judge of Probate,
St. Clair County,

Ashville, Alabama.

Code 1940, Title 49, Sections 52-61, 101-102—Crippled children—
Counties—Appropriations.

Counties are not authorized to appropriate public funds for the purpose of erecting a building to house the Crippled Children's Clinic in Birmingham.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of November 17, 1944, is as follows:

"In the very near future there will be a drive in the State to raise funds for the purpose of erecting a building to house the Crippled Children's Clinic in Birmingham, Alabama.

"As you know, this Clinic serves the counties of the State and treats and cares for those afflicted children in the various counties whose parents are not financially able to pay for this medical care, and to those that are not financially able to have their children treated the services rendered to those children is on a charitable basis, and the counties are expected to be called on to appropriate money to the Crippled Childrens' Clinic in the coming drive.

"Will you please advise if counties can legally appropriate money to the Crippled Childrens' Clinic?"

Counties may exercise only such powers as are expressly delegated to them by the Legislature and such additional powers as may be necessary for the exercise of express powers where the Legislature has not specifically provided the mode or manner of exercising express powers. **Arlledge v. Chilton County**, 237 Ala. 96; **Poyner v. Whiddon**, 234 Ala. 168; **Stone, ex rel. Towle vs. Stone, County Treasurer**, 236 Ala. 82.

And so where the Legislature has expressly provided for the mode of exercising a power the county is limited to the mode so provided.

I am unable to find any provision of law whereby counties are authorized to appropriate or donate public funds for the purpose of erecting a building to house the Crippled Children's Clinic in Birmingham, Alabama.

With reference to dependent children, counties are authorized to appropriate such funds as may be deemed necessary in accordance with the provisions of Article 1, Chapter 4, Sections 52-61, Title 49, Code 1940. County departments of public welfare, however, are charged with the administration of all funds appropriated or available in the counties for aid to such dependent children (Section 54, Title 49).

With reference to crippled children, I am unable to find any specific provision for aid by counties unless it be by appropriation for their physical restoration through the State Board of Education as provided in Sections 101-102, Title 49. See opinion of this office to Judge of Probate, Butler County, May 13, 1940, Quarterly Report, Attorney General, Volume 19, p. 138.

There is obviously a distinction to be drawn with respect to aid by counties between dependent children as defined in said Article 1 and crippled children within the purview of Section 101, *supra*, and in my opinion the only

authorized means whereby crippled children may receive aid from counties is either as dependent children or by appropriation to the State Board of Education for administration, of funds so appropriated.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

November 29, 1944.

Hon. E. P. Russell, Director,

Department of Corrections and Institutions,

Montgomery 4, Alabama.

TAXATION—
STATE EXEMPTION—

1. The State, its agencies and instrumentalities, while engaged in the performance of essential governmental functions are immune from Federal taxation unless these activities fall within the field of interstate commerce and tend to embarrass the Federal Government in the enforcement of the Commerce Clause of the United States Constitution.

2. The sovereign states, by adopting Article 1, Section 8, Clause 1, of the United States Constitution, did not delegate power to the Federal Government to levy a tax on property of the state used in the performance of necessary governmental functions, nor did they delegate power to tax the states' instrumentalities or agencies in the accomplishment of such functions.

3. The State in the establishment, maintenance and operation of prisons for the confinement of convicts is acting in a purely governmental function.

4. Chapter 15, Title 26, U. S. Code (Sections 2000 et sequi) levying a tax on the manufacture and sale of tobacco, snuff, cigars and cigarettes and prescribing the manner of enforcing the law does not expressly name the states, nor does it, by necessary implication from its language, terms and purposes show an intention to tax the states, and hence they are not liable for such taxes.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for an official opinion, bearing date of November 6, 1944, is as follows:

"Mr. Louis Wessinger of the United States Department of Internal Revenue, called at this office today and discussed the State's liability for tax on the tobacco manufactured in the Draper Prison tobacco factory. As you doubtless know leaf tobacco is purchased and processed in this factory. Prisoners are given fifteen cents a week designated on our record as 'tobacco money'. Tokens which can only be used at state prison stores are given prisoners, and these inmates also are permitted to buy for cash. As far as we know none of the state manufactured tobacco is sold to other than the prison inmates.

"Section 2000 of the Internal Revenue Code is the basis for Mr. Wessinger's contention. He agreed to investigate further; meantime request an investigation by your office and a ruling regarding the state's liability for a federal tobacco tax."

It appears from your letter that the State buys leaf tobacco and manufactures the same in its prison and gives the same to the prisoners in a named amount per week, and the prisoners in addition to this allowance are permitted to purchase at the prison store tobacco for cash. No tobacco is manufactured for sale nor is sold to the public. The question presented is this, Is the State liable to the Federal Government for the tobacco tax under Section 2000 of Chapter 15, Title 26 of the United States Code (Title 26, U. S. C. A., Section 2000)?

That part of the section making the levy is in this language:

"Upon all tobacco and snuff manufactured in or imported into the United States and sold by the manufacturer or imported or removed for consumption or sale, there shall be levied, collected and paid the following taxes."

This taxing statute contains 198 sections dealing with this tax levy.*

Several constitutional questions and fundamental rules for construing constitutions and statutes enter into an answer to this question. The leading ones are:

1. Have the states, by the United States Constitution delegated to the Federal Government power to make the levy?
2. If so was authority granted to levy the tax against the state or its governmental agencies in the performance of governmental functions of the state?
3. Did Congress by the internal revenue tax on tobacco, etc., intend to include the activities of a state in the discharge of its governmental functions?

We will use these questions as a basis for considering the entire problem presented and treat them in the order named.

Article 1, Section 8, Clause 1 of the United States Constitution, so far as material here, is in this language:

"The Congress shall have power to lay and collect taxes, duties, imports or excises to pay the debts and provide for the common defense and general welfare of the United States."

By this provision the states obviously delegated to the Federal Government power to levy a tax on property as well as excises, but did they delegate power to tax the property of the state and its agencies in the performance or necessary governmental functions? In the solution of constitutional questions the same rules of interpretation and sources of judicial information may be resorted to as in construing a statute granting power. **Rhode Island v. Massachusetts**, 12 Fed. 722; **Adams v. Storey**, 1 Paine (U. S. 79, 1 Fed. Cas. No. 66.)

The Constitution is to be construed in the sense in which the words and terms were understood by those who made and adopted it. **The Huntress**, 12 Fed. Cas. No. 6914; **Ex parte Bain**, 121 U. S. 12.

The scope and effect of many of the constitutional provisions are best ascertained by bearing in mind what the law was at the time the Constitution was adopted and ratified, not as reaching out for new guarantees, but as securing such as the law then recognized. **Ex parte Wilson**, 114 U. S. 422; **Mattox v. United States**, 156 U. S. 243.

All these cited authorities are giving methods to ascertain the true intent of the makers of the Constitution from the language used therein. This is but the cardinal rule for construing a constitution, statute or written document in arriving at the intent of the makers. Applying these rules and principles, what was the status of the states with reference to taxing and fastening burdens upon these sovereignties at the time of the adoption of the Constitution? At this time it was the settled principle of construction of statutes that, "General words in a statute do not include nor bind the government by whose authority the statute was enacted where its sovereignty, rights, prerogatives or interest are involved. It is bound only by being expressly named or by necessary implication from the terms and purpose of the act." (Black on Interpretation of Laws, page 119.)

Continuing on this subject, the author says:

"This is a very ancient rule of the English law, and is equally applicable to the national and state governments in this country. It is said that laws are supposed to be made for the subjects or citizens of the state, not for the sovereign power."

And again the author says:

"Generally speaking, therefore, the state is not bound by the provisions of any statute, however, generally it may be expressed by which its sovereignty would be derogated from, or any of its prerogatives, rights, titles, or interests would be divested, save where the act is specifically made to extend to the state, or where the legislative intention in that regard is too plain to be mistaken."

Continuing the author says:

"Neither is the state affected by tax laws unless expressly named; that is to say, statutes imposing taxation in general terms are not understood as authorizing the assessment of taxes upon the property of the state, real or personal, *** " (*Black on Interpretation of Laws*, pages 119-120)

The author here cites Federal cases to support the text as well as English decisions. These principles are applicable to the constitutional delegation of power to levy a tax under Article 1, Section 8, Clause 1, of the said Constitution. It is common knowledge that the Constitution was prepared by men who were the most learned and profound statesmen of the ages, and the Constitution was submitted to the various states for adoption and again this same class of statesmen constituted the delegates of the state constitutional conventions that adopted the Federal Constitution.

We must presume that these men knew the long existing rules, above stated, and that the language in Section 8 of the Constitution, here under consideration, did not include or apply to the states and were not intended to apply. It cannot be justifiably concluded that the makers of the Constitution and the states in adopting it intended to delegate authority to the Federal Government to levy taxes on the property of the states or the essential governmental agencies of the states.

Since the adoption of the Federal Constitution the federal and state courts have recognized the principles, above cited, and it is the settled law. These authorities show that it is the settled law of this country that, owing to the peculiar form of our government and from the relations of the states to the national government and its authority there are certain inherent limitations upon the powers of each to tax, among which is the principle that the state cannot levy a tax on the Federal Government and its property and agencies and the Federal Government cannot levy a tax on the state or its agencies in the performance of its governmental duties, nor can it levy a tax upon the state's property. **Second, Cooley, Constitutional Limitations**, Eighth Edition, pages 995-998; **Cooley on Taxation**, Fourth Edition, Section 113; 61 *C. J.*, pages 343, 359, 366 and 371; 11 *Am. Jur.*, (Constitutions) Section 174; **Williams v. Bunn**, 282 U. S. 216.

The courts of England have made some exceptions to the above principle by holding that the principle does not apply to legislative enactments to suppress wrongs, frauds, etc. **Black on Interpretation of Laws**, pages 119-120; **Nordone v. United States**, 302 U. S. 379. It is not practical or necessary to review the authorities on this subject for they are legion.

At and prior to the adoption of the Federal Constitution, sovereignties had very largely confined their activities to purely governmental functions, but since that time the states have engaged in state activities that are private and corporate in their nature, and the courts have qualified the ancient rule, above stated, by establishing an exception to the effect that there is no immunity to a sovereign state as to its activities of a private nature.

The Supreme Court of the United States still recognizes the old rule that the states have retained authority to be immune from embarrassment or bur-

den while engaged in governmental functions. There is no dispute as to this being the settled ruling of the court. The difficulty is met by applying the rule to a given case to determine whether a named act is done in the discharge of governmental functions or done in the exercise of a private or a corporate capacity. In any event the mere fact that the state derived revenue from the operation of the governmental function does not subject it to federal taxation. **New York v. Graves**, 299 U. S. 401, **Bush v. Commissioners**, 300 U. S. 353, 365. In this latter case the question was whether the salary of the Chief Engineer of the Bureau of Water Supply of the City of New York was a part of his taxable income, the court said:

"The answer depends upon whether the water system of the city was created and is conducted in the exercise of the city's governmental functions. If so its operations are immune from Federal taxation, and, as a necessary corollary, 'fixed salaries and compensation paid to its officers and employees in their capacity as such are likewise immune.'" (Page 360.)

The court cited *New York ex rel Rogers* against *Graves* 299 U. S. 401, 408. This *Brush* case discusses the phrase "governmental functions" and shows that this phrase has been qualified by the court in a variety of ways, some holding that the exemption of the state, its agencies and instrumentalities from federal taxation was limited to those cases which were of a strictly governmental character and did not extend to those used by the state in the carrying on of an ordinary private business; other cases define the phrase so as to confine its meaning to an essential governmental function of the state; other cases define the phrase as applying to activities that are usually governmental functions; and still other cases hold that the phrase had reference to activities in which the state traditionally engaged. In the course of discussion of these cases the court uses this forceful language:

"So long as our present dual form of government endures, the states, it must never be forgotten, 'are as independent of the general government as that government within its sphere is independent of the States.' **Collector v. Day**, 11 Wall. 113, 124. And, as it has said in **Texas v. White**, 7 Wall. 700, 725, and often has been repeated—'the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government.' The unimpaired existence of both governments is equally essential. It is to that high end that this court has recognized the rule, which rests upon necessary implication, that neither may tax the governmental means and instrumentalities of the other." (**Brush v. Commissioner**, 300 U. S. 352 at page 364.)

Continuing the court said:

"*** there is a zone of debatable ground within which the cases must be put upon one side or the other of the line by what this court has called the gradual process of historical and judicial 'inclusion and exclusion.'" The court in this case reaches this conclusion:

"We conclude that the acquisition and distribution of a supply of water for the needs of the modern city involve the exercise of essential governmental functions, *** " Page 370.)

Dealing with state immunity from taxation the Supreme Court uses this language:

"There may be state agencies of such character and so intimately associated with the performance of an indispensable function of state government that any taxation of them would threaten such interference with the functions of government as to be considered beyond reach of federal taxing power." *Helvering v. Gerhardt*, 304 U. S. 405, 424. See *Helvering v. Tennell*, 303 U. S. 218, 223.

Where the principle of immunity applies it is not affected by the amount of a particular tax or by the resulting interference, whether much or little, but immunity is absolute. *McCulloch v. Maryland*, 4 Wheat. 316, 432; *Johnson v. Maryland*, 254 U. S. 51, 55-56; *Fox Film Company*, 286 U. S. 123, 128.

It is the established law in this country that the erection, maintenance and operation of a prison by the state is a purely governmental function, being a part of the administration of the criminal law even though some revenue is derived from the labor of its inmates. It is a part of the police system for the preservation of order, the security of society and is the performance of the state's duty to provide for the custody, employment and maintenance of the convicts. 41 *Am. Juris*, (Prisons and Prisoners) Section 3 and citations. An elaborate system of prisons and prisoners, providing for their custody, health, protection and care has been established in this state. Code 1940, Title 45, Section 1 et sequi.

In caring for the convicts by feeding, clothing and protecting his health and his fitness and comfort the Supreme Court of Alabama has said that it is certainly not going too far to say that the prison authorities are not going beyond their bounds in manufacturing tobacco for their use and pleasure. In this case the court had before it a suit on a surety bond of a contractor who was a builder of public highways. There was a provision in the bond for the payment of labor, materials and supplies used in the performance of the contract. Included in the supplies furnished was tobacco and cigarets. The court held that these articles may have contributed something to the human energy put into the construction of the roads by the laborers and the court allowed the claim. *Union Indemnity Company v. Hadley*, 220 Ala. 292.

In *Liggett and Myers Tobacco Company*, 13 Fed. Sup. 143, 145, the tobacco furnished by a state hospital for its patients may fall under the head of medicine. It is true that case held that the maintenance of a state hospital was not the exercise of a governmental function citing cases that held that furnishing water to the inhabitants of a city was not the exercise of governmental functions. This case passed on another question which really ended the case. The case went to the Supreme Court where it was affirmed on the grounds here last mentioned. The Supreme Court did not pass upon the lower court's holding that the hospital was not a state governmental instrumentality. 299 U. S. 383.

The states in adopting the Federal Constitution placed certain restrictions on their own immunity from federal embarrassment. In Article 1, Section 8, Clause 3, of the United States Constitution, are the words conferred power on the Federal Government "to regulate commerce with foreign nations and among the several states." The Supreme Court has held that hav-

ing delegated this power to the general government, the states are subject to control by that clause to regulations governing interstate commerce. **United States v. California**, 297 U. S. 175. However, this holding does not affect the question now under review as the state here is not engaged in interstate commerce.

In the light of the foregoing principles and cited authorities we will examine Section 2000 of the United States Code, Chapter 15, noted in your question.

We must presume that the Congress knew of the state's immunity and also knew the rule of construction that the sovereign states were not included in a statute fixing liability, and burdens couched in general language did not apply to the sovereignty. These principles are as applicable here as in the matters above discussed in this opinion, and have equal force. This statute was not to correct or punish any evil, but is purely a tax measure to produce revenue. In constructing this section we should look at all the provisions of the Act to determine whether the state falls within its scope and purpose. The universal rule is to levy a tax on the citizen or his property or the property of private corporations and not to levy upon the state or its instrumentalities and agencies.

The Act of Congress here under consideration makes no mention of states or state activities. It requires the execution of a bond by the manufacturer of tobacco, the procurement of a certificate from the collector, the placing of a sign by the manufacturer on the side or end of the building painted in oil color or gilded, giving full name of the business, the making and delivering to the Collector of an inventory on a form prescribed by the Collector, which must be sworn to by the manufacturer's own oath. Sections 2013-2017. The manufacturer must keep a book prescribed by the Commissioner going into great detail. Section 2018. He must make monthly abstracts to the Commissioner. Section 2019.

He must put the tobacco in packages as prescribed. Section 2100. These are only a few of the burdensome requirements. It is a little hard to conceive of the state having to make an oath in its own name. This Act forbids the making of an oath by an agent. Added to all this, the Act provides for a long list of penalties for violation of the many requirements of the Act, including the requirement that the state make an oath itself. Section 2150 et sequi. An examination of these penalties demonstrates that no fair construction of the Act leads to the conclusion that Congress intended to burden and embarrass the states by these provisions, some of them, as we have noticed, being such that the state could not possibly comply with them.

The rule that we cited from Black on Interpretation of Laws, page 119, we may repeat, says that the state is bound only when it is expressly named, or there is a necessary implication from the terms and purposes of the Act. Under this rule of construction, which, we may add, has never been denied by the Supreme Court of the United States or by the decisions of any of the courts of this country, the Act must either include the sovereign by name or the language of the statute and its purposes must be such as to lead to a necessary implication that it is intended to apply to the sovereign. As we have said the consensus of the opinions of the courts are that whether the sovereign is included depends upon the legislative environment. **United States v. Cooper Corporation**, 312 U. S. 600, 123 Fed. 2d 57 (Fifth Circuit),

In the case of *Georgia v. Evans*, 316 U. S. 159, the court held that the word "person" as used in the Sherman Anti-trust Act included the state. The Act and the reasoning of the court in construing it clearly show that the case has no application to the question before us. Moreover, the Court in the Georgia case was enforcing a penalty provided for in the Act. This would bring the case within the exceptions to the rule of construction that where the statute was to prevent a wrong or to punish for it, the rule does not apply.

In *VanBrocklin v. Tennessee*, 117 U. S. 157, the Court announced the rule that taxing statutes are to be construed as not to embrace government property or its instrumentalities unless the legislative intent to include it is plainly and clearly expressed. This is but the application of the rule in cases of statutes levying taxes. *Greil Brothers v. Montgomery*, 182 Ala. 291; 11 *Am. Juris.* (Constitutions) Section 174.

From the foregoing announced principles and authorities we conclude:

First, that the State, its agencies and instrumentalities while engaged in the performance of essential governmental functions are immune from federal taxation unless these functions are operating in the field of interstate commerce.

Second, that the states by adopting Article 1, Section 8, Clause 1, of the United States Constitution did not delegate power to the Federal Government to levy a tax on the state property used in or for the purpose of performing necessary governmental functions, or upon state agencies acting within the scope of their authority in performing proper and necessary governmental functions.

Third, that the state in the establishment, maintenance and operation of prisons for the confinement of convicts is acting in a purely governmental function.

Fourth, Chapter 15, Title 26, of the United States Code, levying a tax on the manufacture of tobacco, snuff, cigars, and cigarettes and prescribing the manner of enforcing the same, when construed as a whole, shows that the Act was not intended to apply to sovereign states, and that the state is not liable for the tax as presented by your letter of inquiry.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

November 30, 1944

Hon. H. G. Dowling,

Commissioner of Revenue,

Department of Revenue,

Montgomery, Alabama.

Taxation—Ad valorem—Assessments—Military and Naval Affairs
—Title 51, Section 52 and 58, Code 1940—U. S. C. A., Title 50, Section
560, as amended.

There is nothing in the Soldiers' and Sailors' Civil Relief Act of 1940, as amended (Title 50, Section 560, U. S. C. A., as amended) which prohibits the imposition of the penalty imposed by Title 51, Section 52, Code 1940, for the failure to assess property for taxation within the time provided by law, because such property is owned by a person in the military service of the United States.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of November 13, 1944, is as follows:

"Several county tax assessors have written the Department of Revenue wanting to know whether or not they should add a 10% penalty on the assessment of real and personal property owned by persons in the military service of the United States where said property is not assessed by such owners within the time required by the laws of this State. To state the proposition otherwise: Does Subsection 4 of Section 500 of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, or any other federal law, prohibit the imposition of said penalty on such owners for their failure to assess such property within the time required by the laws of this State?

"As this matter is of interest throughout the State, I shall thank you to give me your official opinion thereon as soon as you reasonably can."

The penalty referred to in your request is imposed under the provisions of Title 51, Section 52, Code of Alabama 1940, which Section is as follows:

"§ 52. Procedure by assessor upon failure to procure list.—Having failed to procure on verbal or written demand from any delinquent his list of taxable property on or before the third Monday in January, the assessor shall ascertain from inquiry or otherwise the property and other subjects of taxation upon which such person is liable to be taxed, and shall list and make return thereof upon the proper blank and note upon

such returns the failure of the owner after notice to make such return and the accrual of a penalty of ten percent of the taxes to be assessed thereon."

The pertinent provisions of Section 500 of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended (Title 50, Section 560, U. S. C. A., as amended), are as follows:

"(1) The provisions of this section shall apply when any taxes or assessments, whether general or special (other than taxes on income), whether falling due prior to or during the period of military service, in respect of personal property, money, or credits, or real property owned and occupied for dwelling, professional, business, or agricultural purposes by a person in military service or his dependents at the commencement of his period of military service and still so occupied by his dependents or employees are not paid.

"(2) No sale of such property shall be made to enforce the collection of such tax or assessment, or any proceeding or action for such purpose commenced, except upon leave of court granted upon application made therefor by the collector of taxes or other officer whose duty it is to enforce the collection of taxes or assessments. The court thereupon, unless in its opinion the ability of the person in military service to pay such taxes or assessments is not materially affected by reason of such service, may stay such proceedings or such sale, as provided in this Act, for a period extending not more than six months after the termination of the period of military service of such person.

"(4) Whenever any tax or assessment shall not be paid when due, such tax or assessment due and unpaid shall bear interest until paid at the rate of 6 per centum per annum, and no other penalty or interest shall be incurred by reason of such nonpayment. Any lien for such unpaid taxes or assessment shall also include such interest thereon."

It will be noted from paragraph 2 of the above statute that certain property designated in paragraph 1 of said statute owned by a person in the military service cannot be sold to enforce the collection of taxes or assessments, nor may any proceeding or action for such purpose be commenced except upon leave of the court.

Paragraph 4 refers to taxes or assessments which are not paid when due and provides that such taxes or assessments shall bear interest. It further provides that no other penalty or interest shall be incurred by reason of the nonpayment of such taxes or assessments.

There is nothing in Section 500, *supra*, nor in any other Federal statute which prohibits the imposition of the penalty imposed by Section 52, *supra*, for the failure to assess property for taxation within the time provided by law, because such property is owned by a person in the military service of the United States. The relief granted is applicable only to prevent a sale of property to enforce the collection of such taxes or assessments, except upon leave of the court.

In connection with this question, while not necessary in answering your request, I deem it advisable to call your attention to Title 51, Section 58, Code of 1940, which Section is as follows:

"§ 58. By whom and when penalties remitted.—No penalties assessed against any property owner or his property for failure to return property for taxation shall be remitted except by order of the department of revenue upon proof that the delinquent taxpayer was absent from the state, and had no resident agent therein during the time for making returns of property for taxation, or when such taxpayer, labors under the disabilities of minority, or is a lunatic, or upon proof made that he was unable, by reason of sickness, to make such return in time required by law."

In the case of *State v. Clarke*, 240 Ala. 362, 199 So. 543, it was held that the above Section is mandatory in imposing a penalty. The case further held that "the State Department of Revenue *** alone may remit a penalty imposed for the failure to return property for taxation."

It is probable that the majority of the residents of Alabama in the military service of the United States were absent from the State of Alabama, and had no resident agent in the State during the time for making returns of their property for taxation. Under Section 58, supra, the State Department of Revenue, upon proper proof that such persons were absent from the State and had no resident agent therein during the time for making returns of property for taxation, may remit the penalty imposed by Section 52, supra, for failure to return their property for taxation during the period provided by law.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

November 30, 1944

Hon. Evans Dunn, Sheriff's Attorney,

Bowers, Dixon & Dunn,

Jefferson County,

Birmingham 3, Alabama.

Convict in Jefferson County jail, required to perform hard labor,
is entitled to benefit of the "good behavior statute."

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your request for an official opinion, bearing date of November 18, 1944, is as follows:

"As attorney for Holt A. McDowell, Sheriff of Jefferson County, I have been requested to ask your opinion in the following matter.

"Under an act of the legislature of 1943, approved July 8, 1943 Supplement, Title 15, Section 325, the sheriff of this county may work prisoners sentenced to confinement in the county jail at hard labor within the confines of the jail. The sheriff is desirous of knowing whether such prisoners are subject to the provisions of Section 253, Title 45, 1943 Supplement to the Code.

"This latter section specifies a schedule of deductions from sentences on account of good conduct. The doubt which arises is that in the latter section the prisoners who are entitled to time off for good behavior seem to be those 'confined, in execution of the judgment or sentence upon any such conviction, in the penitentiary, or at hard labor for the county, for a definite term, other than for life ***.'

"Where such prisoners who have been imprisoned in the county jail are worked at hard labor within the confines of the county jail, is that the equivalent, for purpose of being entitled to time off for good conduct, to a sentence at hard labor?

"The sheriff is very desirous of rewarding prisoners who are deserving, and would like to have authority to do so, providing it can consistently be done."

Section 235, Title 15 (Pocket Supplement), Code of 1940, pertinently provides that:

" *** in counties having a population of one hundred forty thousand or more *** prisoners sentenced to imprisonment in the county jail may be worked at hard labor within the confines of the jail at the discretion of the sheriff."

The effect of the above quoted provision is that insofar as a prisoner is concerned, his sentence to imprisonment in the Jefferson County jail is a sentence to hard labor, whenever the sheriff so decrees, and when the performance of hard labor is an accomplished fact, he, like others duly sentenced to hard labor for the county, is entitled to the provisions of the "good behavior" statute. Such a prisoner has been confined at hard labor for the county.

It appears clear that in the enactment of Section 253, Title 45 (Pocket Part), Code of 1940, the Legislature intended to permit a prisoner, sentenced to hard labor, to so conduct himself in a manner whereby he might earn a reduction in his sentence. It would be ironical to hold that one prisoner performing hard labor could enjoy a reduction of his sentence while another could be required to perform equally as hard labor and not be entitled to

such reduction. The prisoner's good behavior and not where he performs the "hard labor" is the governing criteria in determining whether he is entitled to a reduction in his sentence.

In view of the above it is my opinion that whenever a person is sentenced to a definite term in the Jefferson County jail, and is required to perform hard labor therein, upon proper certification as to his good behavior by the Sheriff to the Director of the Department of Corrections and Institutions, the Director may order such reduction in the prisoner's sentence as is authorized by Section 253, Title 45 (Pocket Supplement), Code of 1940.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

December 4, 1944.

Hon. W. T. Stewart, Mayor,

City of Hartselle,

Morgan County,

Hartselle, Alabama.

Code 1940, Tit. 52, §§ 177-197—City Superintendent of Schools—

The principal of a county high school may also be employed by a City Board of Education as City Superintendent of Schools provided such employment does not violate his contract with the County Board of Education as such high school principal, or interfere with his duties as such principal.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of November 27, 1944, is as follows:

"The City of Hartselle has asked our advice as to whether it could employ the principal of the Morgan County High School as City Superintendent of the City of Hartselle.

"The City of Hartselle is an incorporated municipality and had between 2700 and 2750 inhabitants under the last Federal Census, so that it should, under Section 148, Title 52 of the Code, have a City Board of Education and the schools should be run under the City Board.

"Although Hartselle has the right to the City Board, it has for some time, for reasons of economy, had the schools run under the County Board of Education. The City does not have a high school, but has elementary and grammar schools running to the eighth grade.

"The Morgan County High School is located in Hartselle and the City has supplemented the funds which this County High School has each year in order to have a nine-months' school and in order to pay the teachers a reasonable compensation. They now have as principal of the Morgan County High School an entirely competent man who has a college degree and could qualify as City Superintendent. The County Board cannot pay him enough to hold him in the future.

"The City of Hartselle would like to elect a City Board and operate its City schools under the Board and would like to elect the man who is principal of the Morgan County High School, lives in Hartselle and is in every way qualified, as Superintendent of the City schools.

"We notice in the Code that in 1939 the Attorney General gave an opinion to the effect that a City Superintendent of schools cannot at one and the same time serve as County Superintendent of Education. We can see the reason for this, but it seems to us that the principal of the County High School could entirely consistently, serve as City Superintendent. If this can be done, the City of Hartselle can pay this principal some additional compensation, making his compensation enough for him to remain in Hartselle as principal of the Morgan County High School and at the same time, serve as City Superintendent of schools. Will you please advise whether or not, in your opinion, this can be done?

"If it is necessary for a formal request for an opinion to be made, the City of Hartselle will request the opinion, or if you prefer, you can show this as a request from the City of Hartselle and can address your reply to Mr. W. T. Stewart, Mayor, City of Hartselle, Hartselle, Alabama, and send us a copy of your opinion."

I am unable to find any provision of law disqualifying the principal of a county high school from serving as a City Superintendent of Schools and performing the administrative duties imposed upon such superintendent by law. Code 1940, Tit. 52, §§ 177-197.

Whether such a principal may with propriety be employed also by a city Board of Education as City Superintendent of Schools will depend largely, in my opinion, on the terms of his employment as high school principal by the County Board of Education, as to which I am not informed.

In the absence therefore of any conflicting duties, or any contract inhibitions, I am of opinion that a city board of education may employ the principal of a county high school to perform the administrative duties of a city superintendent of schools, provided such employment does not violate

the terms of his employment as high school principal or interfere with the discharge of his duties as such high school principal.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

December 5, 1944.

Hon. S. H. Hendrix,

City Clerk,

City of Mobile,

Mobile County,

Mobile, Alabama.

Municipalities—Expenditures—

The city of Mobile has legal authority to become a member of the National Rivers and Harbors Congress, which organization was organized to study waterways and shipping developments and to aid in securing favorable legislation in Congress in reference to such waterways and shipping developments; to pay the annual membership fee of \$200.00, and the expense of representatives of such organization.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of November 21, 1944, is as follows:

"I am enclosing herewith copy of a Resolution adopted by the Board of Commissioners of the City of Mobile, which is self-explanatory.

"We will appreciate it very much if you will, at your convenience, let us have the benefit of your opinion on this subject."

The enclosed copy of the above referred to resolution which is duly certified by the City Clerk of the City of Mobile, Alabama, is as follows:

"BE IT RESOLVED BY THE BOARD OF COMMISSIONERS OF THE CITY OF MOBILE that the Attorney General of the State of Ala-

bama, be and he hereby is requested to advise this Board whether the City of Mobile has the legal authority to become a member of the National Rivers and Harbors Congress, to pay to that Congress an annual membership fee of TWO HUNDRED AND NO/100 (\$200.00) DOLLARS, and to pay the expenses of representatives of the City attending conventions of the Congress. As required by Section 242 of Title 55 of the Alabama Code of 1940, as amended by an act of the legislature of the State of Alabama approved on June 28, 1943, the following facts are set forth showing the nature and character of the foregoing question which makes the advice or opinion sought necessary to the present performance of the acts sought to be done and which must be immediately performed:

"The National Rivers and Harbors Committee, 1147 Connecticut Avenue, Washington 6, D. C., is a voluntary organization with a membership composed of former members of the Congress of the United States, present or former federal and state officials, members of Chambers of Commerce and other civic improvement groups, waterways and harbors experts from all parts of the United States, leaders in civic, legal and engineering fields, and municipalities, including a number of municipalities of the State of Alabama. All members of Federal Congress and officers of the United States Engineers engaged in rivers, harbors and flood control work are ex-officio members.

"The organization was formed over forty years ago for furthering waterways and shipping developments and for preventing inimical legislation to such interests. Its findings are presented to the President of the United States, to proper congressional committees, to the Maritime Commission, to the Secretaries of War and the Interior, to the Chief of Army Engineers and to many other officials.

"The National Rivers and Harbors Congress is now using every effort to secure legislation authorizing the construction of the 'Tombigbee Cut-Off' which will connect the Tombigbee River and Tennessee River waterways, and if this project be constructed, it is believed that it will be of inestimable value in the development and growth of the City of Mobile. The Congress also works for many other waterways' developments which will be of great benefit to the City. It is only through concerted and integrated effort that the authorization for the construction of these great projects can be obtained. Since there is a fight on in the United States Congress now to determine whether the 'Tombigbee Cut-Off' will be authorized, it is urgent that prompt action in furtherance of the project be taken.

"The attention of the Attorney General is respectfully called to the opinion of the Supreme Court in the case of *Fitts vs Commissioners of the City of Birmingham*, 141 So. 354, 224 Ala. 600.

"SECTION TWO: The City Clerk is hereby directed to immediately transmit a certified copy of the resolution to the Attorney General of the State of Alabama.

ADOPTED:

/s/ **S. H. Kendrix**

City Clerk.

11/21/44"

(Seal of City of Mobile)

The case of **Fitts vs. Commission of City of Birmingham, et al**, 224 Ala. 600, 142 So. 354, referred to in your request held "that municipal corporations can exercise those powers only which are granted in express words or fairly implied to those expressly granted and those essential to the declared objects and purposes of the corporation and not those which are simply convenient, but not indispensable." This case further held "that the City of Birmingham had the necessarily implied power to protect and promote its well-being before the Legislature and to incur and pay reasonable compensation therefor."

While recognizing that there was a sharp conflict in the authority "as to the right and authority of a municipal corporation to expend public revenue to obtain or oppose legislation before the State Legislature or the Congress ***" the Court in the above cited case adopted the broader view laid down in the case of **Farrel v. Town of Derby**, 58 Conn. 234, 20 Atl. 460, 7 L. R. A. 776, which " *** upheld the authority of the town under its general implied powers to employ a representative to attend the General Assembly to look after the interest of the town as the same might be affected."

In commenting on the **Farrel case**, the Court in the **Fitts case**, in an opinion by Chief Justice Anderson, said:

" *** The Court, proceeding upon the theory that procuring and defeating certain measures might affect the general welfare of the town and the taxpayers and citizens thereof and, as this was within the inherent power of the municipality, the expense of having the interest of the town so protected was necessarily incident to the power of enjoying this protection."

In the **Fitts case**, while the Court had before it General Acts of 1915, page 296, Section 6, which Section, as stated by the Court, "delegates to the governing body of the City of Birmingham a broad exercise of the police power, limited or restricted only by the state or federal constitutions," the decision seems to be based on the general implied power of a municipal corporation to promote its well being before the State Legislature and to pay reasonable compensation therefor, rather than any authority implied from the provisions of Section 6 of the Act of 1915.

The following reasoning was advanced by the Court in the **Fitts case**:

" *** Moreover, there may be a good reason for permitting the towns and cities to incur the expense of obtaining favorable legislation through an attorney or other agent, and not granting the same right to the counties. The counties have the right to rely upon the legislative representatives to protect the interest of their respective counties, while the cities and towns cannot repose the same confidence in them as there may be several towns and cities in the same county and as to which rivalry may exist. At any rate, the Stone Case is not in conflict with the present holding."

From the above set out resolution, it will be seen that the reason the City of Mobile wishes to become a member of the National Rivers and Harbors Congress is based upon the desire of the City to be properly represented in Congress, before the Maritime Commission and other Federal agencies. The purpose of such representation is to procure favorable legislation in Congress

in reference to waterways and shipping developments which will benefit the City of Mobile.

The National Rivers and Harbors Congress was organized to study waterways and shipping developments and to aid in securing favorable legislation in Congress in reference to such waterways and shipping developments. The immediate legislation in which the City of Mobile is interested is "legislation authorizing construction of the 'Tombigbee Cut-Off' which will connect the Tombigbee River and the Tennessee River waterways." The City of Mobile believes that such project would be of great value in the development and growth of the City.

It is my opinion that the question under consideration comes within the scope of the opinion of the Fitts case. Therefore, it is my conclusion that the City of Mobile has legal authority to become a member of the National Rivers and Harbors Congress, to pay the annual membership fee of Two Hundred Dollars, and the expenses of representatives of the city incurred in attending conventions of the Congress.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

December 5, 1944.

Hon. J. F. Laseter,

Judge of Probate,

Barbour County,

Clayton, Alabama.

TAXATION—

EXEMPTION FROM PAYMENT OF POLL TAX OF PERSONS WHO HAVE SERVED OR ARE SERVING OR MAY SERVE IN THE FUTURE IN THE ARMED FORCES OF THE UNITED STATES IN TIME OF WAR.

1. The amendment to Section 194½ of the State Constitution exempts from payment of poll tax all persons who are serving or have served or may hereafter serve in the armed forces of the United States at a time when the Government is engaged in a war with a foreign sovereignty.

2. The amended section, 194½, does not exempt from payment of poll tax persons whose services began and ended while the United States was at peace with all sovereignties.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for an official opinion bearing date of November 14, 1944, is as follows:

"I would like to have an opinion on amendment No. 2 voted on November 7 General Election as to whether or not members of the Armed Forces are exempt from paying 1944 poll tax. As you know that poll tax payments are being made at this time and members of Armed Forces are asking the question and are under the impression that they are not due poll tax payments since amendment No. 2 was ratified."

The constitutional amendment, to which you refer, is an amendment to Section 194½ of the State Constitution. The Act of the Legislature, submitting this amendment to a vote of the people for adoption, together with the amendment itself, are to be found in General Acts of the Legislature of 1943, page 199-201.

The obvious purpose of the amendment is to exempt from the payment of poll tax all persons who have served or are now serving, or may at any time serve in the armed forces of the United States when the government was, is or shall be at war with a foreign state or sovereign government. Such exempt service person must either be serving or have served and been honorably discharged. The section has no application to persons who never served in the armed forces when the United States was at war. A person whose service began and ended during a period of time when the United States was at peace with all other nations is not exempt from the payment of a poll tax.

Persons serving or who have served and been honorably discharged are exempt from the payment of all unpaid poll taxes payable prior to the beginning of service and during such service, and also all future poll tax.

The Act of the Legislature submitting this constitutional amendment provides that these exemptions shall be self-executing and retroactive. The legal effect of this provision is that no enabling Act of the Legislature is required to make the section effective. The persons exempted from payment of the poll tax may be required by the taxing authorities to furnish evidence of his service, or of his service and honorable discharge. This would require the exempt person to furnish the authorities with proof that he had served and had an honorable discharge or was then serving, and that at the time of such service the United States was engaged in war with a foreign sovereignty. This might be burdensome to the exempt persons. It is quite evident from the Act of the Legislature, submitting the amendment to a vote, that the Legislature had this in mind, and undertook to provide a short and simple method to meet these requirements by authorizing the Governor to prescribe rules and regulations for the issuance by the probate judges of certificates of exemption. Such a certificate will furnish all the taxpayer needs to establish

his exemption. However, the failure of the Governor to prescribe such rules and the failure of the probate judge to furnish such certificate does not affect the right of exemption to such service person. He is exempt in any event.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

December 6, 1944.

Hon. Alex Brantley,

Probate Judge, ex-officio Judge of County Court,

Pike County,

Troy, Alabama.

Code 1940, Tit. 13, § 235—Tit. 12, § 110—Deputy Solicitor pro tem.—

1. The county court, in the absence of the deputy solicitor, is authorized to appoint a deputy solicitor pro tem, to prosecute cases in said court.

2. A member of the County governing body is ineligible to such appointment.

3. Such deputy solicitor pro tem. is not entitled to compensation for his services as such.

4. The circuit solicitor is not entitled to mileage or expenses for attending a session of the county court outside the county of his residence except as provided by Code 1940, Tit. 13, § 227.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of December 1, 1944, is as follows:

"Due to shortage of lawyers in Pike County resulting from the war and other causes, this county has been without a deputy solicitor for several months, and no lawyer is now available for appointment. Of course we have no way of knowing just how long this situation will last.

"Mr. Huey, Circuit Solicitor, has attended several sessions of the county court, but due to his absence as the result of illness at one session of the court, I appointed Hon. Jack L. Giddens as special prosecuting

attorney, and it may be that I shall have to do so again, as it may happen that Mr. Huey will not be able to attend all sessions of the county court until a qualified lawyer is available for him to appoint as deputy solicitor. Several questions have arisen concerning my appointment of a special prosecuting attorney to prosecute criminal cases in the county court in the absence of both the circuit and a deputy solicitor. Please therefore advise me:

"(1) Do I, as presiding judge of the county court, have authority under Section 235 of Title 13 of the 1940 Code, when neither the circuit or a deputy solicitor is present at a session of said court, to appoint a competent attorney to act in the solicitor's place?

"(2) If no such authority exists under said section of the code, do I, as presiding judge of said court, have the inherent power and authority to appoint a competent attorney to act in the solicitor's place at a session of said court when neither the circuit or a deputy solicitor is in attendance?

"(3) If I, as presiding judge of said court, do have such authority, is there any legal objection to my appointing a county commissioner, who is a competent attorney, to act in the solicitor's place?

"(4) If I have such authority, do I also have implied authority under section 235 of Title 13 of the Code to draw a warrant on the treasurer of Pike County in favor of the person so appointed for the sum of \$10.00 for each day he is so engaged in court?

"(5) If payment for the services of such special prosecuting attorney is not impliedly authorized by section 235 of Title 13 of the 1940 Code, then is payment for such services expressly or impliedly authorized by Section 110 of Title 12 of the 1940 Code, or any other provision of law?

"(6) If payment for the services of such special prosecuting attorney is expressly or impliedly authorized by either Section 110 of Title 12 of the 1940 Code, or some other provision of law, then is the amount to be allowed for such services left to the sound discretion of the court of county commissioners or is there some provision of law definitely or impliedly fixing the amount to be allowed for such services? Specifically: Would such special prosecuting attorney be entitled to or limited to the solicitor's fees earned by him in the prosecution of cases before the county court? Would such special prosecuting attorney be entitled to and limited to \$10.00 for each day as provided by section 235 of Title 13 of the 1940 Code?

"(7) If in answer to question six you say that payment for the services of such special prosecuting attorney is expressly or impliedly fixed at a definite amount for each day in attendance at court, then is it necessary for the person so appointed to file a claim and payment thereof be authorized by the commissioners' court, or may I draw a warrant in his favor for such services without submission of a claim therefor to the Commissioners' court?

"(8) Does Pike County have authority, under Section 110 of Title 13 of 1940 Code, or any other provision of law, to pay Mr. Huey for his mileage and actual expenses while attending County Court, until someone is available for appointment as Deputy Solicitor? If so, what will be his mileage allowance?"

Courts exercising criminal jurisdiction have inherent power, in order to prevent delay and miscarriage of justice, to appoint prosecuting officers pro tem., in the absence of the regular prosecuting officer or attorney. *Ex parte Diggs*, 50 Ala. 78; 27 C. J. S. 436, § 28(c).

In the circuit court appointment and compensation alike are regulated by statute. Code 1940, Tit. 13, § 235. I find no statute however regulating appointment of a deputy solicitor, or prosecuting officer pro tem. in the county court. The result is that such appointments in county court must rest upon the court's inherent power at common law.

In *Mobile County v. Williams*, Judge, 180 Ala. 639, 647 (3), 61 So. 963, with reference to compensation and fees claimed by public officers it was said:

"An officer demanding fees for services rendered must point to some clear and definite provision of the statute which authorizes the demand, and compensation cannot be allowed unless it is conferred by a strict construction of the language employed in the statute."

In the present instance there is no statute even to authorize appointment of a prosecuting officer pro tem. in the county court, so that there is no basis for any claim for compensation for his services, such as exists where solicitors pro tem. are appointed in the circuit court, unless such claim may be grounded on Code 1940, Tit. 12, § 110 relating to so-called "equitable" claims against a county. *State v. Stone*, 237 Ala. 78, 185 So. 404.

That case holds, however, that the statute applies only to claims made by persons based on contracts and not to claims by officers for services as such officers and for performance of duties imposed upon them by law. In my opinion an attorney who accepts appointment as prosecuting attorney (or officer) pro tem. in the county court thereupon ipso facto becomes a public officer and stands in the shoes of the regularly acting deputy solicitor for whom he is thus substituted, *pro tempore*, *pro hac vice*, and has no contract basis for a claim for services rendered by virtue of such appointment.

A member of the county governing body is clearly disqualified, or ineligible, for appointment as prosecuting attorney pro tem. in the county court by express statutory prohibition. Code 1940, Tit. 12, § 7, forbids him from discharging the duties of any other office.

Nor am I able to find any provision of law other than Tit. 12, § 241, that would authorize payment of mileage or expenses to a circuit solicitor in attendance upon the county court out of the county of his residence. Said Section 241 limits such allowances to \$100 annually out of the treasury, evidently the state treasury, which together with his salary is the limit of his compensation. Code 1940, Tit. 13, §§ 227, 260.

It is to be regretted that no statutory provision exists for compensation to a temporary or substitute appointee for a deputy solicitor rendering service in the county court in the absence of the deputy solicitor. I am driven to the above conclusions, however, by the doctrine declared in **Mobile County v. Williams, Judge and State v. Stone, supra.**

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

December 7, 1944.

Hon. G. H. Howard,

Judge of Probate,

Elmore County,

Wetumpka, Alabama.

GUARDIAN AND WARD—

1. The guardian has title and possession of the ward's property solely for the purpose of executing the trust vested in him, and when he dies, resigns, or is removed, the title and possession or right of possession passes by operation of law out of the guardian to his successor.

2. Parties executing obligations to pay the guardian thereby undertake and obligate themselves to pay to whomsoever may be the guardian of the ward's property.

3. The State of Alabama has no authority to decline payment of the state's obligations made to a guardian because such obligations are not endorsed and assigned by the guardian to whom the obligations were made payable.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for an official opinion, bearing date of November 8, 1944, is as follows:

"During the last three years, guardians, particularly those under the jurisdiction of the Veterans Administration, have invested heavily in Series "E" War Bonds and Bonds of the State of Alabama. So long as the

same person acts as guardian, the matters and things hereinafter set out, of course, cause no trouble.

"When a guardian is removed or dies, however, and another is appointed to succeed him, the question arises whether or not it is necessary for the preceding guardian or the personal representative of the deceased guardian to execute a written transfer to the new guardian. Several instances of that nature have arisen recently in this county.

"It has been the practice for the retiring guardian or the administrator of the deceased guardian simply to deliver the manual possession of such securities to the new guardian without a transfer, the decree of the court discharging the old guardian reciting that fact, the new guardian thereupon listing such securities in his inventory. It has been generally understood that the legal title to all such assets follow the office of guardian and not merely the individual who happens to be serving at the time. It would seem to appear reasonable to say that if a guardian resigns, he has no further authority whatsoever except to make final settlement and deliver the assets to the court or to the new guardian.

"However, in a recent case in this county, the state officials are taking the position that the new guardian should have a written transfer or assignment of State Bonds, and that until that is done interest thereon cannot be legally paid to the new guardian but that all checks in payment of interest should be made to the old guardian, who had resigned, who had made settlement and who delivered the securities to the new guardian. They further take the position that new bonds should be issued in the name of the new guardian but that this cannot be done until there is a written transfer or assignment of the bonds by the old guardian to the new one.

"If that position be sound then it would logically follow that the same reasoning would apply to securities issued by the United States Government, and this would lead to losses particularly as relates to Series "E" War Bonds. Such Securities cannot be assigned at all according to the regulations of the Secretary of the Treasury. The only way the new guardian could have his money invested in such securities would be for the old guardian to cash them in at a lower rate of interest than they would bear if retained until maturity and then deliver the cash to the succeeding guardian who could thereupon reinvest the same. It would thus appear that if over a period of years there were several changes in guardians of any one estate, it would be impracticable to invest in certain types of securities at all without a sacrifice in the income.

"It has been suggested by state officials that your opinion on these matters should be procured in order that they and the guardians, together with the court, should know how to proceed. The real question involved may be stated simply as follows:

"(1) Where a guardian resigns or dies and a settlement is made, and State and Government bonds held by the former guardian are delivered to the succeeding guardian or to the court, is it necessary that there be an actual written transfer or assignment of such bonds, where they are

issued to and in the name of the preceding guardian as such, or does the legal title vest automatically in the new guardian without such transfer or assignment.

"Please give me your opinion on this question."

As we understand your question the State bonds and United States "E Bonds" were made payable to a named guardian as such. The established rule of law is that a guardian holds the possession and title to the ward's property simply for the purpose of executing the trust conferred upon him. And when he dies, resigns or is removed such possession and title does not descend to his heirs or his representatives, but passes by operation of law to the succeeding guardian. Such succeeding guardian is vested with the power and it is his duty to take the property of such ward's estate into his actual possession and to collect all debts due the estate, whether made payable to the ward or to the preceding guardian of the trust estate.

It is also well settled in this State, as well as elsewhere, that parties executing obligations to pay a guardian as such thereby undertake to pay to whomsoever might be the guardian of the ward's property when the obligations accrue, and that a payment to such guardian satisfies the obligation and releases the obligor. *Kelly v. Wilson*, 234 Ala. 455.

It might be added that the Government must have recognized these principles when it authorized the issuance of these "E Bonds". They are registered bonds, and non-transferrable. They are payable to the registered owner, but under rules and regulations of the Government, if such registered holder is dead or otherwise incompetent the bonds may be paid to the party or parties showing themselves to be the real owners or entitled to receive the payments.

From the foregoing it must follow that it is not necessary that the bonds actually be transferred or assigned by the guardian in whose name they were made payable, but the succeeding guardian is authorized to receive payment of interest due and unpaid before he was qualified as guardian and all payments subsequently falling due. A payment to him is a release as to the amounts paid.

The State of Alabama has no authority to decline payment of the interest or principal of these bonds until the bonds are endorsed or assigned by the former guardian or his personal representative.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

December 11, 1944.

Hon. Ben P. Singleton,

Chief Examiner of Public Accounts,

Department of Finance,

Montgomery, Alabama.

Code 1940, Tit. 8, §§ 191-193—Auxiliary State Forests—Taxation—

Payments made by the owner under Code 1940, Tit. 8, §§ 191, 192, upon withdrawal of lands, "as auxiliary State forests" belong one-half to the State's general fund, and one half to the county's or counties', general fund, respectively, and are not subject to distribution by State and county to the different funds for which ad valorem taxes are levied.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion bearing date of December 7, 1944, is as follows:

"Please refer to Sections 192 and 193 of Title 8, 1940 Code, and advise me in answer to the following:

"Should the State's 50% and the County's 50% of the amount of Privilege Tax go into their respective General Funds or should it be distributed by the State and by the County to the different funds for which ad valorem taxes are levied?

"Inasmuch as this matter has come up in one of the counties, we would appreciate your early attention and reply to this communication."

The effect of Code 1940, Tit. 8, §§ 189-198 is to provide procedure whereby the owner of growing timber may for a period of five years or more have the same exempted from property taxation by the State, county or other political subdivision.

While legislative power is well recognized to create reasonable classification of property for exemption from taxation, yet all property taxes must be "assessed in exact proportion to the value of such property," are limited in amount, and must be assessed at the same rate throughout the State. Constitution 1901, §§ 211, 214, 215, 217.

The payments required to be made under Code 1940, Tit. 8, §§ 191, 192 upon "withdrawal" of lands "as auxiliary State forests" are declared in the latter section, and in one and the same breath, so to speak, to be "a privilege tax for the entry and withdrawal of said lands" and also "in lieu of the annual ad valorem tax not assessed against said timber." The two descriptions are repugnant and inconsistent. Such payments cannot in the nature

of things be both privilege and property taxes. The problem is therefore to determine, upon principles of sound statutory construction, to which category they shall be assigned.

If these payments are property taxes they violate the constitutional requirements of equality and uniformity above referred to. On the other hand, there are no such constitutional requirements as to privilege or license taxes and so considered, such payments would not offend the Constitution.

It is well settled that where a statute is susceptible of two meanings or constructions, one of which would render it unconstitutional, and the other not, the latter construction will prevail. *State v. Praetarians*, 226 Ala. 259, 146 So. 411; *Reynolds v. Collier*, 204 Ala. 38, 85 So. 465; *Wilkinson v. Sholes*, 200 Ala. 279, 76 So. 45.

Accordingly I am of opinion that such payments are payments of a privilege, or license, tax and cannot be held to be payments of property or ad valorem tax despite the declaration of the statute that they are "in lieu of the annual ad valorem tax."

Being payments of a privilege tax they are not subject to distribution or application otherwise than as required in Section 193 of said Title 8, viz: one-half to the State Treasury, and one-half to the county treasury of the county where the lands lie, or proportionately if there be two or more counties involved.

In the absence of statutory directions to the contrary, or anything to indicate that such funds are impressed with a trust, they belong to the general fund of the state and county, in the proportions indicated, respectively.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

December 15, 1944.

Hon. George L. Cleere,

Brigadier General, ASG,

The Adjutant General,

State Military Department,

Montgomery 5, Alabama.

State Military Department cannot carry public liability and property damage insurance.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your request for an official opinion, bearing date of November 30, 1944, is as follows:

"It has been the policy of the Military Department for the past several years to carry liability and property damage insurance on certain rifle ranges owned or leased by the Department. There is some question as to whether or not we can legally carry this insurance, paying the premiums, based on the fact that Section 118, Title 35, Military Code, removes any liability on the part of any officer or enlisted man of the military forces.

"I would appreciate your rendering an official opinion in the above connection, as we now have a policy to renew."

In my opinion your department cannot carry public liability and property damage insurance to protect either the State or military personnel.

As indicated in your letter, Section 118, Title 35, prevents actions against officers or enlisted men. For purpose of clarity the entire section is herein set forth.

"§ 118. No action allowed against officers and enlisted men on account of military duties.—No action or proceedings shall be prosecuted or maintained against a member of a military court or officer, or person, acting under its authority, or reviewing its proceedings, on account of the approval or imposition or execution of any sentence of any warrant, writ, execution, process or mandate, of a military court, nor shall any officer or enlisted man be liable to civil action or suit or criminal prosecution for any act done while in the discharge of his military duty, which act is in line of duty."

In addition to the above, Section 14, Constitution of 1901, is as follows:

"That the State of Alabama shall never be made a defendant in any court of law or equity."

Insofar as immunity from suit is concerned, the Military Department of the State of Alabama occupies a position similar to other State departments, such as the Alabama Insane Hospital, the Board of Trustees of the University of Alabama, Alabama College, and the Alabama Institute for the Deaf and Blind. Our Courts have held that a tort claim cannot be maintained against the first three of these institutions. See *White v. Alabama Insane Hospital*, 138 Ala. 479, 35 So. 454; *Cox v. Board of Trustees of the University of Alabama*, 161 Ala. 639, 49 So. 814; *Harmon v. Alabama College*, 117 So. 747.

In an opinion rendered by this office on June 5, 1943, it was held that the Alabama Institute for the Deaf and Blind could not purchase liability insurance. See Quarterly Report of Attorney General, Vol. 31, p. 72; also Quarterly Report of Attorney General, Vol. 6, p. 66; and Quarterly Report of Attorney General, Vol. 22, p. 127.

In view of the statutory immunity from suit enjoyed by the officers and enlisted men in the Military Department, and the Constitutional immunity of the State, there is no liability to insure.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

December 19, 1944.

Hon. Ben P. Singleton,

Chief Examiner of Public Accounts,

Department of Finance,

Montgomery 4, Alabama.

Counties—Sinking Funds—Constitution 1901, Section 224

1. Assets of county sinking fund devoted by law or contract to the payment of a specific debt are deductible in computing county's outstanding debts under Section 224, Constitution of 1901.

2. Assets of county sinking fund which may lawfully be used for purposes other than for the payment of a specific debt are not deductible in the computation of outstanding county indebtedness under Section 224, Constitution of 1901.

Opinion by Assistant Attorney General Cooper.

Dear Sir:

Your request for an official opinion, bearing date of December 8, 1944, is as follows:

"Please refer to the opinion of your office of October 8, 1928, on page 31, Biennial Report for 1928-1930, and opinions of our courts subsequent to 1928 and advise me in answer to the following:

"1. If a county creates an indebtedness for which it specifically pledges to its retirement a portion of certain revenues of the county or levies a special tax for the purpose of paying the indebtedness so created, and this revenue is placed in a sinking fund, when computing a county's standing in regard to its constitutional debt limit, under Section 224 of the Constitution of 1901, is the amount set aside in the sinking fund deducted from the outstanding indebtedness chargeable to the debt limitation?

"2. If a county owes an indebtedness for which no specific revenue is pledged to be set aside in payment thereof and the county, by resolution of the Governing Body voluntarily creates a sinking fund and pledges a certain portion of a specific source of revenue for the repayment of the indebtedness and states in the resolution that such fund earmarked and placed in the sinking fund can never be used for any other purpose, is the amount in such a sinking fund deductible as a credit when figuring a county's debt limitation under Section 224 of the Constitution?"

The opinion of October 8, 1928, you refer to holds that a sinking fund created by a county under Section 6755, Subsection 22, 1923 Code (Title 12, Section 12, Item 21, 1940 Code) is not deductible from the county's gross indebtedness in arriving at the maximum county indebtedness allowable under Section 224 of the 1901 Constitution.

In my judgment, the opinion is correct. When the county creates a sinking fund, under its general authority now contained in Title 12, Section 12, Item 21, 1940 Code, for the purpose of paying its debts at maturities thereof, the county may, under some circumstances, legally use the assets of such sinking fund for other purposes where there is no pledge either by law or contract to the payment of a particular debt. **Biennial Report of Attorney General, 1932-34, Page 621.** Therefore, in such a case the assets in the sinking fund are not irrevocably pledged to the payment of a particular debt and are not deductible when computing the outstanding indebtedness of the county any more so than is the cash in the general fund.

But I am of the opinion that the assets of a county sinking fund **pledged by law or contract to the payment of a specific debt** (a "debt" within the meaning of Section 224 of the Constitution of 1901) are deductible from the gross indebtedness of the county when determining the maximum indebtedness allowable under Section 224. **Town of Camden v. Fairbanks, Morse & Co., 204 Ala. 112, 86 So. 8; 206 Ala. 293, 89 So. 456; Taxpayers and Citizens of the County of Shelby v. County of Shelby, et al., Mss.**

The question in every case is to determine whether the particular fund is irrevocably pledged by law or contract to the payment of a specific debt.

Your first query, then, must be answered in the affirmative because the proceeds of the special tax cannot be lawfully applied to any purpose other than that for which the tax was levied. **Constitution of 1901, Section 215; Board of Revenue of Shelby County v. Farson, 197 Ala. 375, 72 So. 613.** The answer to your second query is in the negative for, under certain circumstances at least, the fund can be applied lawfully to other purposes notwithstanding Title 37, Section 265, 1940 Code.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

December 20, 1944.

Hon. Wm. T. Seibels,

Solicitor of the 15th Judicial Circuit,

Montgomery County,

Montgomery, Alabama.

A person convicted of driving while intoxicated, and restrained from operating a motor vehicle upon the highways of this State by the trial Judge, is subject to having his Driver's License revoked by the Director of Public Safety.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your request for an official opinion, bearing date of December 2, 1944, is as follows:

"Please give me an official opinion as to whether or not a person convicted by the Circuit Court for driving a motor vehicle upon a public highway of this state, while intoxicated, and whose license has been revoked for a specific period by the Trial Court, under authority of Title 36, Section 2, Code of Alabama of 1940, is subject to having his license revoked for an additional period of time by the Director of Public Safety, under authority of Title 36, Section 68 of the Code. If so, is this latter section constitutional?

"The above stated questions are constantly recurring and it is respectfully requested that your opinion on these matters be furnished at your earliest convenience."

In my opinion a person convicted in the Circuit Court for driving a motor vehicle upon a public highway of this State while intoxicated, and who has been prohibited from driving any motor vehicle upon the highways by an order of the Circuit Judge is also subject to having his driving license revoked by the Director of Public Safety under authority of Title 36, Section 68, Code of 1940.

Permit me to call your attention to the pertinent provisions of Title 36, Section 2, Code of 1940, which are as follows:

“ *** As additional punishment the court trying the cause shall have authority to prohibit and must prohibit the person so convicted from driving any motor vehicle upon the public highways of this state for a period not exceeding one year. On the second or subsequent conviction he shall be punished at hard labor for not more than one year or in the discretion of the court a fine of not less than one hundred dollars nor more than one thousand dollars, or both, and in addition thereto the court trying said cause shall, as additional punishment, have authority to prohibit the person convicted from driving a motor vehicle upon the highways of this State for a period of not less than thirty days nor more than one year. *** ”

We have among the decisions of our courts the following rulings which are of material assistance in construing statutes:

“In the construction of statutes to ascertain the purpose thereof, when necessary a court may consider the origin, the contemporaneous history, the prior condition of the law, as well as the general powers and course of legislation.” *McCreless v. Tennessee Valley Bank*, 208 Ala. 414, 94 So. 722; *State v. Board of Revenue of Jefferson County*, 201 Ala. 568, 78 So. 964.

“In determining meaning of statute, courts should consider external historical facts which led to its enactment.” *American Bakeries Co. v. City of Opelika*, 229 Ala. 388, 157 So. 590.

The first statutory authority whereby a court, upon conviction of a person for “driving while intoxicated,” could prohibit such person from driving appeared in the Acts of 1927. (See Acts of 1927, p. 248, Section 48.) It must be noted that this restriction could be imposed only on a second or subsequent offense; also, that no penalty attached for its violation other than a fine or short sentence for “contempt of court.”

In 1937 the Legislature (General and Local Acts of 1936-1937, Extra Session, p. 229) increased the Court's authority as follows:

“ *** As additional punishment the court trying the cause shall have exclusive authority to prohibit and must prohibit the person so convicted from driving any motor vehicle upon the public highways of this state for a period not to exceed one year. On a second or subsequent conviction he shall be punished by imprisonment at hard labor for not more than one year or in the discretion of the court a fine of not less than one hundred (\$100.00) Dollars nor more than one thousand dollars, or both, and in addition thereto the court trying said cause shall, as additional

punishment, have **exclusive** authority to prohibit the person convicted from driving a motor vehicle upon the highways of this state for a period of not less than thirty days nor more than one year. *** (Underscoring supplied)

The word **exclusive** was deleted when the provisions of this Act were brought forward as Section 2, Title 36, Code of 1940. I particularly stress that the Court's authority to prohibit operation of a motor vehicle extends to all persons so convicted, such as a resident of another state who, through reciprocity, is not required to have a license subject to cancellation in this state. It must also be noted that in 1927 a driver's license was not required in this State.

The genesis of the provisions of Section 68, Title 36, Code of 1940, is found in the Acts of the Legislature of 1939, page 300, subsections (d), (e), (f), (g), and (h) of Section 10 thereof being as follows:

"(d) The Director of Public Safety is authorized to suspend or revoke the license of any resident of this State of the privilege of a non-resident to drive a motor vehicle in this State upon receiving notice of the conviction of such person in another State or any offense therein which, if committed in this State, would be grounds for the suspension or revocation of the license of a driver. (e) Whenever any person is convicted of any offense for which this Act makes mandatory the revocation of the drivers license of such person by the Director of Public Safety, the court in which such conviction is had shall require the surrender to it of the driver's license then held by the person so convicted and the court shall thereupon cause the same to be forwarded together with a record of such conviction to the Director of Public Safety. (f) Every court having jurisdiction over offenses committed under this Act, or any other Act of this State or municipal ordinance of any municipality in this State regulating the operation of motor vehicles on highways, shall cause to be forwarded to the Director of Public Safety a record of the conviction of any person in said court for a violation of any said laws other than regulations governing standing or parking, and may recommend the suspension of the driver's license of the person so convicted. (g) For the purpose of this Act the term 'conviction' shall mean a final conviction. Also, for the purposes of this Act a forfeiture of bail to secure a defendant's appearance in court, which forfeiture has not been vacated, shall be equivalent to a conviction. (h) The Director of Public Safety shall forthwith revoke the license of any driver upon receiving a record of such driver's conviction of any of the following offenses, when such conviction has become final: 1. Manslaughter resulting from the operation of a motor vehicle; 2. Driving a motor vehicle by a person who is an habitual user of narcotic drugs or while intoxicated; *** "

The Act further provides "That *** all laws and parts of laws in conflict herewith be and the same are hereby repealed."

It is my opinion that Sections 2 and 68, *supra*, each has a separate field of operation. However, should it be conceded that the two sections conflict, Section 68, being enacted latest in point of time, and repealing all laws and parts of laws in conflict therewith, repeals any conflicting provisions that may exist in Section 2, *supra*.

It has been held that, "Where statutes are in irreconcilable conflict, later act, in so far as in conflict with former act, is the law." **Fidelity & Deposit Co. of Maryland v. Farmers Hardware Co.**, 223 Ala. 477, 136 So. 824; **Union Central Life Ins. Co. v. State**, 226 Ala. 420, 147 So. 187.

Therefore, if under some factual situation it is found that the two involved Sections are in irreconcilable conflict, it will be necessary to hold that Section 67 repeals the conflicting provisions of Section 2.

The fact that the provisions of both Acts were incorporated in the Code of 1940 would not serve as a reenactment of the provisions of Section 2 where they might conflict with the provisions of Section 68. In 59 Corpus Juris at page 893 it is said:

"The acts of revisers (of a code) in continuing to include a statute which had been repealed in subsequent revisions of the statutes does not operate to keep it in force, *** " Citing **Noble v. State**, (Mo.) 187 S. W. 896 (rev. 203 S. W. 956) as authority.

On the same page it is said:

"It has been stated broadly that a compiler is not a lawmaker, that codification is not legislation, and that a statute neither gains nor loses forces by the place it occupies in the collection of laws. Its sanction, it was said, depends on its own terms, and would be the same if it had been provided anywhere else in a code." **Paulson v. Hurlburt**, 93 Or. 419, 183 P. 937.

In 25 Ruling Case Law, page 925, the same proposition is covered in the following words:

"It has been held that where two inconsistent statutes are carried into the codified law, the one last passed, which is the latter declaration of the legislative will should prevail." See **Adkins v. Arnold**, 235 U. S. 417, 35 S. Ct. 118, 59 U. S. (L. Ed.) 294; **Hillsborough County v. Jackson**, 58 Fla. 210, 50 So. 423.

Where there is conflict, repugnancy or inconsistency between two provisions of law as they appear in the Code, the court will look to their history and origin and give effect to that provision which was last enacted by the Legislature, as being the last expression of its will and intent. The later enactment will prevail over the earlier one insofar as the earlier Act is in conflict with or inconsistent with the later enactment. **Steele v. State**, 61 Ala. 213, **Gunter v. State**, 83 Ala. 96, **Calhoun County v. Watson**, 152 Ala. 554, 44 So. 702.

Your attention is called to an opinion rendered by this office on September 15, 1941, Quarterly Report of the Attorney General, Volume 24, page 208, which covers many of the propositions of law with which you are confronted.

In the absence of any stipulation as to which Section of the Constitution

it is contended that the statute is repugnant, and an indication as to the manner in which it is so, I must refrain from passing on this question.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

December 20, 1944.

Hon. L. E. Boswell,

Member County Board of Revenue,

District No. 1,

Houston County,

RFD No. 1, Box 29,

Dothan, Alabama.

Houston County Board of Revenue may employ a nonresident as county engineer.

County engineer cannot hold both the office of county engineer and county road and bridge foreman.

Houston County Board of Revenue may furnish an automobile to the county engineer.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your request for an official opinion, bearing date of November 22, 1944, is as follows:

"I am a member of the Houston County Board of Revenue, District No. 1, and hereby request an opinion from you as to the matters hereinbelow set forth.

"On November 13, 1944, the said Houston County Board of Revenue employed one F. L. Mullins as County Engineer under the law as found in Title 12, Sections 67-72, Code of 1940, his term to begin in January, 1945. The action by said Board is shown by the following minute entry of the appropriate record:

"A motion was made by W. P. Calhoun, seconded by H. O. Summerford to employ F. L. Mullins as County Engineer under the law as found in Tit. 12, Sec. 67 et seq. of the 1940 Code. J. B. Trawick made a motion to employ Lee Cameron as Road Foreman under the Houston County Local Act and known as the Rish Bill. Upon taking a vote, W. P. Calhoun and H. O. Summerford voted for F. L. Mullins and J. B. Trawick and L. E. Boswell voted for Lee Cameron. The vote being tied, it became the duty of the Chairman to untie the vote. The chairman voted for F. L. Mullins, and declared the said Mullins elected, his said term of duties to begin at the close of his present term in January.'

"The said F. L. Mullins is a bona fide resident of Dale County, Alabama, actually lives at Newton, Alabama; on the occasion of his election or employment as above, he stated to the Board that he would continue to reside in Dale County during the term of office or employment to which he was elected.

"1. Under the aforementioned County Engineer law, and with the action of said Board on November 13, 1944, as above, being the sole and only action taken by said Board as to the election or employment of said Mullins for said term, and without more, are the provisions of Local Act No. 156 (H.—Calhoun), page 71, passed at Regular Session, 1935, and approved September 13, 1935, sufficient authority for said Board to furnish to said Mullins, without charge or expense to him, an automobile for transportation purposes in connection with his duties as such engineer, including the trips made daily to and from his home in Dale County, Alabama, said charges or expenses to include gas, oil, tires, mechanical upkeep, etc?

"2. Can the said Board legally elect or employ said Mullins both as County Engineer and County Road and Bridge Foreman under the provisions of said County Engineer law?

"3. Can said Board legally elect or employ said Mullins both as County Engineer and County Road and Bridge Foreman under the provisions of the Local Act above referred to?

"4. To what extent are the pertinent provisions of the said Local Act applicable to the provisions of said County Engineer Act?

"Your response to the foregoing in due time will be greatly appreciated."

Your request refers to the "Rish Bill." Please permit me to call your attention to the following: The Rish Bill was approved on July 23, 1931, and appears at page 266 of the Local Acts of Alabama of 1931. This Act was amended by House Bill No. 533 (Local Acts of Alabama of 1935, page 71) which was in turn repealed by House Bill No. 1014 (Local Acts of Alabama of 1935, page 253). Senate Bill No. 294 (Local Acts of Alabama of 1939, page 133) specifically repeals all of the above cited Acts and, in part, provides:

"Section 4. That there is hereby conferred upon said Board of Revenue of Houston County, Alabama, and the members thereof, all of the

general authority, powers and duties now provided, or which may hereafter be provided to the Board of Revenue or Commissioners Court, under the general laws of the State of Alabama, and amendments thereto not inconsistent with the provisions of this Act, *** "

In my opinion the Houston County Board of Revenue has authority under Senate Bill No. 294, supra, to employ a county road and bridge foreman at a salary not exceeding two hundred fifty dollars a month. It is also my opinion that as this Board may elect it may employ a county engineer pursuant to the provisions of Section 67, et seq., Title 12, Code of 1940, whose qualifications and duties are set forth in the cited code provisions.

There appears no doubt as to the authority of a county board of revenue to furnish a county engineer with an automobile. See Quarterly Report of the Attorney General, Volume 20, page 37. In the case of **Ensley Motor Co. v. O'Rear, County Treasurer**, 196 Ala. 481, 71 So. 704, in dealing with this proposition, the Supreme Court said:

" *** Incidental to the power to build roads, bridges, jails, hospitals, and court houses is the implied power in the board or court to properly inform themselves and to protect the county by the employment of engineers and architects accustomed to such construction, that the needed facility may be better constructed and adapted and the general public thus better served. *Smith v. McCutchen*, 146 Ala. 455 (41 South. 619).

"(3) In the location, erection, repair, or removal, or in the furnishing of the county's buildings, bridges, and roads, the court of county commissioners or board of revenue have a discretion that cannot be exercised for them by any other county official, or directed by any court, except only when their acts amount to fraud, corruption or unfair dealing. In the performance of these statutory duties, boards of revenue and courts of county commissioners exercise a function that is quasi Legislative.
*** "

I have contacted the State Highway Department and am informed that it participates to the extent of fifty per cent of the county engineer's salary.

It is fundamental that one person cannot hold both the office of county engineer and county road and bridge foreman at the same time. However, the abstract of the meeting of the Board of Revenue does not disclose that Mr. Mullins was appointed to both offices; instead it appears that he was appointed county engineer.

I find nothing in the statutory provisions requiring a county engineer to reside in the county by which he is employed.

It is my further opinion that the matter of furnishing the county engineer with an automobile to be used in his official duties; the advantages arising from his having available a constant means of transportation which will permit him to proceed directly from his home to whatever point in Houston County his duties or an emergency may require his presence, compared with the disadvantage to the County by delays which might arise by his having to journey first to whatever place the automobile may be stored; the savings in time which will result from his use of the automobile thereby permitting

a greater utilization of his professional skill in his other duties compared with the costs of operating the automobile, are matters which are addressed to the sound discretion of the Board of Revenue and upon which I cannot pass judgment.

In conclusion, let me state that it is my interpretation of the statutes that (1) the County Board of Revenue has authority to employ a nonresident as county engineer; (2) it may furnish him with an automobile for use in his official duties, and (3) (in the absence of fraud, corruption and unfair dealings) it may permit him to retain possession of the automobile twenty-four hours each day, despite the fact that he uses same to journey to his home outside the limits of the County.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

December 27, 1944.

Hon. E. G. Pilcher,

Deputy Solicitor,

Etowah County,

Gadsden, Alabama.

Judge of a county court has no authority to impose a fine upon a defendant and then permit him to pay same in deferred payments.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your request for an official opinion, bearing date of November 21, 1944, is as follows:

"As deputy solicitor for Etowah County, I desire to present the following question to you.

"If 'A', who is charged with a misdemeanor, should enter a plea of guilty on any misdemeanor charge, do you know any authority under the law by which the county judge could impose a sentence of say \$100.00, fine or any other amount, and give the defendant a fixed period of time by which he could pay the fine and cost in partial payments? Is it not the law that when the fine and cost is not presently paid, that he has to have someone to confess judgment for him to assure payment, say, within a reasonable time?

"I make the above inquiry for the reason that a great number of defendants who are convicted and who plead guilty are asking for a opportunity to pay the fine and cost on the partial payment basis. I am not able to find any authority in the law for these partial payments."

It is my opinion that the judge of a county court has no authority to impose a fine on a convicted defendant and then permit him to pay same in deferred installments.

Permit me to call your attention to the provisions of Section 341, Title 15, Code of 1940, which, pertinently, are as follows:

"If the fine and costs are not paid, or judgment confessed according to the provisions of sections 339 and 340 of this title, the defendant **must** either be imprisoned in the county jail or, at the discretion of the court, sentenced to hard labor for the county as follows: *** " (Underscoring supplied.)

Particular attention is called to the fact that the Legislature used the word "must" in this statute instead of the word "may." It is true that the courts have often interpreted the word "must" as not mandatory. However, in each case examined, the application of the particular statute involved necessitated the exercise of judicial discretion. In the above cited statute, the court's discretion is confined to whether the defendant is imprisoned in jail or sentenced to **hard labor**. The court cannot vary or change the term for which the defendant must be sentenced. It is, therefore, my interpretation of the statute, and I believe the intent of the Legislature, that the word "must" in this particular application is mandatory and not discretionary.

I am unable to find any Alabama case covering this particular proposition. However, in one case at least, **Long v. Collier**, 154 Ga. 673, 115 S. E. 9, the courts of our sister state held that a court officer, by accepting a promise to pay, discharges the sentence and becomes bond for the fine, and that he must collect it for the promisor.

In **Harris v. State**, 28 Ala. App. 528, 169 So. 787, and in **Nix v. State**, 27 Ala. App. 94, certiorari denied 232 Ala. 53, 166 So. 716-718, our courts held that when a defendant was sentenced to pay a fine, and did not confess judgment with sureties, **the court properly sentenced him to hard labor for the county.**

Your attention is also called to an opinion rendered by this office (Quarterly Report, Volume 22, page 201) wherein a justice of the peace was confronted with practically the same factual situation as outlined in your letter, and it was there held that he had no authority to accept payment of fines in installments. I see no material distinction between a justice of the peace and a judge of a county court insofar as this particular proposition is concerned.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

December 27, 1944.

Hon. Clyde C. Pearson,

Secretary for the Board,

Board for Registration of Architects,

817-18 First National Bank Building,

Montgomery 4, Alabama.

Whenever a corporation engages in the practice of architecture pursuant to the provisions of Section 20, Title 46, Code of 1940, all persons connected therewith in responsible charge of such practice must be registered architects.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your request for an official opinion, bearing date of December 14, 1944, is as follows:

"The architects' registration act amended by the regular session of Legislature in 1943, originally Code of Alabama 1940, Titles 46-51, under section 20, states that a corporation or partnership may engage in the practice of architecture in the state; provided the person, or persons, connected with such corporation, or partnership, in responsible charge of such practice is, or are, registered etc.

"This Board has been under the impression that this section meant that all persons in a firm who have responsible charge of the practice are required to be registered.

"We have an applicant who is a member of a corporation and desires to practice architecture in this state under the name of the corporation.

"Will you please give us your opinion as to whether one responsible person in the corporation only needs to be registered or whether all persons who are in responsible charge of such practice must be registered under our registration act?"

In my opinion all persons in responsible charge of the practice of architecture must be registered architects whenever a corporation engages in this practice pursuant to the provisions of Section 20, Title 46, Code of 1940.

First, let me call your attention to the fact that the 1943 Legislature amended only Sections 8, 9, 13, 14, 15 and 19 of Title 46, Code of 1940. Section 20 thereof remains unchanged and is as follows:

"§ 20. Practice of architecture by corporations or partnerships.—A corporation or partnership may engage in the practice of architecture in this state; provided the person or persons connected with such corporation or partnership in responsible charge of such practice is or are registered as herein required or is or are otherwise authorized to practice. The same exemptions shall apply to corporations and partnerships as apply to individuals." (Underscoring supplied.)

Sections 8 to 20, inclusive, Title 46, Code of 1940, regulate the practice of architecture in this State, and must be construed in pari materia. In determining the legislative intent, which is the law, I call your attention to the provisions of Section 8, which provides:

"In order to safeguard life, health and property any person practicing or offering to practice as an architect in this state shall *** "

As illustrative of the operation of this statute, assume a hypothetical situation where Corporation "A" is engaged in the sale of building supplies, plumbing installations, electrical equipment, hardware, and contracting, and is also engaged in the practice of architecture and employs a registered architect under whose immediate supervision numerous employees work. This architect is responsible to the firm for the accuracy of the architectural work performed, and is also accountable to the Board of Architects, pursuant to the provisions of Section 16, Title 46, Code of 1940, for the work he approves. The statute does not contemplate that the head of the plumbing department, the electrical sales department or even the corporation must be a registered architect. It is sufficient if the corporation has one registered architect who is responsible, answerable and accountable for the architectural work performed by the corporation. On the other hand, assume that Corporation "B" enjoys such a volume of business that one architect cannot pass upon the work of all subordinates. In this case, each employee who is responsible for architectural work performed by subordinates must be a registered architect, regardless of the number so employed.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

December 28, 1944.

Hon. J. B. Vines, Chairman,

Board of Registrars,

Jefferson County,

Birmingham, Alabama.

TAXATION—

EXEMPTION FROM PAYMENT OF POLL TAX UNDER STATE
CONSTITUTION OF PERSONS HAVING SERVED, OR SERVING
IN THE ARMED FORCES OF THE UNITED STATES IN TIME OF
WAR—

1. The cardinal purpose of the Amendment to Section 194½ of the State Constitution is to exempt all persons from the payment of a poll tax as a qualification to vote who have honorably served, or are serving, or may hereafter serve in the armed forces of the United States at a time when it was engaged in a war with a foreign sovereignty.

2. The service rendered must be honorable throughout such period of service. If it is so rendered then the serviceman is exempt from payment of a poll tax although his discharge from the service showed on its face that he was discharged for some cause not involving honorable service that was disconnected with such service, provided the discharge issued to him did not show that it was a dishonorable discharge.

3. The constitutional amendment is addressed to the character of service rendered, and not to the good or bad character of the party rendering it.

4. The serviceman may establish his honorable service by oral or documentary evidence.

5. The records kept by the United States military authorities, showing his enlistment, induction, and service cannot be impeached in an effort or proceeding to establish the serviceman's right to exemption.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

We are in receipt of your letter of the seventh of December, 1944, requesting an opinion on Section 194½ of the State Constitution, as amended, exempting certain persons who are, or have been in the armed forces of the United States from the payment of poll tax.

This office has recently rendered an opinion construing certain phases of this Section of the Constitution, and we are enclosing a copy of this opinion.

In entering upon the consideration of this Amendment we must bear in mind that it is dealing with a subject falling within the independent power of the state so long as it does not run counter to some provision of the Federal Constitution. The well-established rules of construing constitutions, statutes and other written instruments are to ascertain the intent of the written instrument; that the language used is to be taken in its ordinary meaning unless there is something in the instrument indicating that it is intended to have a different meaning.

In the light of these well-established rules of construction it is manifest that this amendment intended to exempt from the payment of a poll tax as a qualification to vote all persons who have honorably served, or who are honorably serving, or who may hereafter honorably serve in the military service of the United States at a time when the Federal Government was, is or may hereafter be engaged in war with a foreign sovereignty.

From the language used in the Amendment it is obvious that to receive the benefit of the exemption the person seeking it must show some indispensable facts: First, that he has rendered or is rendering service in the armed forces of the United States; second, that at the time of the service or some part of it the Federal Government was engaged in war with a foreign state; and third, that such service was honorably rendered.

It is important to note that the word "served" in the Constitutional Amendment is qualified by the word "honorably," that is, that the service was rendered in accordance with principles of honor—uprightness and a regard for obligations as to his conduct; that nothing is said about the moral character of the person who so serves; nothing is said about an honorable discharge. The word "honorable" characterizes the service by limiting it to an honorable service, and further the Amendment furnishes no method for showing these essential elements of the right to claim exemption from the payment of a poll tax.

It is evident that these essentials present purely a question of fact that must be established by the exemptioner by evidence when he seeks the benefit of the Act. He may make proof of his honorable service in the usual procedure by producing evidence that he rendered the service for the United States in the armed forces at a time that it was engaged in war with a foreign sovereignty, and that such service was honorably performed. To do this he may have access to the records made and kept by the United States covering these military operations. The findings and determination of these matters, under rules and regulations prescribed by the Federal authorities vested with power to so act, furnish evidence of the service and its character.

The Constitutional Amendment shows on its face where the service is to be rendered, to-wit: in the military service of the United States. The proper military authorities of the United States have a record showing the history of the service from induction to discharge, and have adopted rules and regulations with reference thereto. Examination of these regulations shows that the Government has made and adopted three classes of certificates of discharge from the service. (Manual of Privileges Provided Armed Forces, page 49.) They are as follows:

"(a) Honorable discharge (W. D., A. G. O. Form 55), is used when service has been honest and faithful, and a character of 'Good,' 'Very good,' or 'Excellent' is given.

"(b) Dishonorable discharge (W. D., A. G. O. Form 57), is used for dishonorable discharge by sentence of a court martial or military commission.

"(c) Blue discharge (W. D., A. G. O. Form 56), is used when the enlisted man is discharged otherwise than as specified above. This form is used in all cases where service has not been honest and faithful or where a character of 'Fair' or 'Poor' is given, and in which a dishonorable discharge cannot be given. It is neither honorable nor dishonorable but one that sets forth the act of discharge."

The first certificate of discharge, denominated "Honorable Discharge," is issue donly to those who have honorably served and had a character that was good, very good, or excellent. This rule shows that it has gone far beyond the provisions of our Constitution. It requires that the service must have been honorable and that the party rendering the service must have a good character of the type there named. Under this classification, although the serviceman's service during the entire period that he served is of the highest type, and meeting all the requirements that go to make it honorable, yet he is denied the certificate unless his character up to the date of the discharge has been good, very good, or excellent. It must be noticed that these classifications even divide the character of the person into several groups; a good character, a very good character, an excellent character, fair and poor characters. The dishonorable discharge takes no account whatever of the character of the service or the party rendering it. It is issued for one reason only, namely, a sentence by a court martial or a military commission.

Under this second classification the service may have been honorably rendered and the serviceman's character immaculate, yet if he has been sentenced by a military court for the violation of any military offense a dishonorable discharge may be issued to such serviceman.

The honorable discharge, here set out, may be issued in discharges due to a number of causes. The Manual provides that an honorable discharge under this form 55 controls except where otherwise specifically prescribed. (Page 50.)

It is otherwise prescribed where it is provided that an honorable discharge will be given for disability incurred in line of duty or under certain contingencies for disability incurred not in line of duty. (Page 50.) There are other specified instances where an honorable discharge will be issued. We will not set these out, but they are to be found on page 51.

It is clear that a certificate of honorable discharge is not confined to honorable service as defined in cases named in form 55. It is manifest that these rules and regulations are for administrative purposes and rest largely in the discretion of the authorities and are more or less arbitrary and artificial.

However, a serviceman to whom a certificate of honorable discharge has been issued may present this as evidence of his honorable service, which would entitle him to an exemption from paying a poll tax.

All three of these certificates, herein set out, as the language indicates, have no application to men who are serving, and further they do not, as we have noted, cover cases where the service person may be otherwise honorably discharged. This is clearly borne out by the following provisions:

1. "The form of discharge certificate in case of minority will be that to which the service rendered by the enlisted man after enlistment or induction will entitle him." (Manual, page 50.)

2. No specific form of discharge is cited for discharge on the ground of dependency, but an honorable discharge is usually given unless otherwise directed by the Board of Officers. (Page 50, Manual.)

3. "An honorable discharge certificate may be given at the direction of the officer with discharge authority in certain instances." (Manual, page 51.)

4. An honorable discharge may be issued in cases of inaptness for service. (Manual, page 51)

5. Honorable discharge may be given where the enlisted man is discharged to take an appointment in some other branch of the service or when the person has been erroneously classified, or where he is released because he is a key man in industry and is transferred to the Reserve Corps. (Manual, page 51.)

We have been considering discharges from the Army. There are rules and regulations for discharges from the Navy, Coast Guard, and Marine Corps. (Manual pages 51-53.) These rules proceed along the same line as those for the Army, but appear to rest more in the discretion of the authority authorized to discharge.

As we have already pointed out our Constitution is dealing with service, not discharge from service, and this service must be rendered in the armed forces of the United States. The fact that the Amendment designates the place of the service does not ingraft into the Amendment the rules and regulations prescribed by the United States giving the grounds of discharge from the service. Under the constitutional Amendment the serviceman may have been convicted of all manner of crimes involving moral turpitude by the civil courts, and yet this would not prevent the exemptioner from receiving the benefit of the amendment unless the crime committed was one done in connection with the carrying on of the war. That is to say the crime must have been one committed in line of duty. The rendition of the service and the character thereof remains a question of fact to be established by evidence, either oral or documentary. The prime and controlling question is service, honorably rendered, disassociated from the general moral character of the person rendering it. The Amendment recognizes the fact, known to all men, that a man may have a general bad character and yet render honorable and heroic service in the armed services of the Government, and on the other hand, he may have a good character and yet be unable to give efficient and valuable service in war that rises to the level of honorable service.

If the records of the Federal Government affirmatively show that the serviceman has at all times acted in an honorable manner in the discharge of all duties in carrying on the war then he is exempted from payment of poll tax although he may have committed wrongs and crimes while in the

service if such wrong doing was not connected with or done in the line of duty. This is true although he was discharged from the service by a military court for offenses disassociated from service rendered in line of duty.

If the serviceman seeking an exemption from poll tax undertakes to sustain his right by the offering in evidence of a discharge issued by the Federal authorities to him, and this discharge shows that his service has been honest and faithful—honorable, then he has established his claim for exemption.

On the other hand, if the recitals in his discharge show that he has not discharged his service duties in carrying on war in an honorable manner then his claim for exemption must fail. Dishonorable is the antithesis of honorable. The Federal discharge made by the proper authorities cannot be disputed in a proceeding to show exemption from payment of poll tax. If the party seeking the benefit of the exemption is still serving, of course, he has no discharge to present, but nevertheless he is entitled to his exemption if his service has been honorably rendered, and he is authorized to establish this in the ordinary modes of proving facts—by testimony of persons knowing the facts or documentary evidence showing the facts.

We may add that the honorable service must continue throughout the entire period served while the United States was at war. The period of service begins as soon as the person has been examined, accepted, and inducted into the service. And this service may be rendered in any of the branches where servicemen are engaged and applies to combat or noncombat service.

It has been impractical to answer all questions involved in your request separately and in detail, nor are we prepared to anticipate other questions that may hereafter arise. What we have said is sufficient to guide you in matters devolving on you in any duty you may have to discharge, unless some other and definite question arises that demands further consideration.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

INDEX

QUARTERLY REPORT, ATTORNEY GENERAL
OCTOBER 1, 1944 THROUGH DECEMBER 31, 1944
INDEX TO VOLUME XXXVII

Page

A

ABSENTEE BALLOTS:

Mimeographed affidavit attached to by staples does not invalidate 16

ACTS (GENERAL AND LOCAL)**GENERAL ACTS 1900-01:**

Page 358 33

GENERAL ACTS 1943:

Pages 199-201 82

GENERAL AND LOCAL ACTS 1936-37 (EX. SESS.):

Page 229 95

LOCAL ACTS 1915:

Page 193 39

LOCAL ACTS 1935:

Page 71 99

LOCAL ACTS 1939:

Page 39 41

Page 259 49

ALABAMA INSANE HOSPITAL:

Leases—Oil and gas—Property granted by Congress at Mt. Vernon 33

ARCHITECTS:

Corporations engaged in practice of architecture—Persons "in responsible charge" must be registered architects 104

ASSESSMENTS:

Owner unknown for current year and prior years 56

Soldiers' and Sailors' Civil Relief Act, as amended—Does not prohibit imposition of penalty for failure to assess property 73

B

BALLOTS:

Absentee—Mimeographed affidavit attached to by staples does not invalidate 16

C

CITY BOARDS OF EDUCATION:

Principal County High School—Employment as City Superintendent of Schools 77

CODE OF ALABAMA 1940:

TITLE 3:

INDEX—Continued

	Page
Sections 77, et seq.	8
TITLE 8:	
Section 17	47
Sections 191-193	90
TITLE 10:	
Sections 4, 6	18
Sections 36, 37	18
Section 95	18
Section 196	18
TITLE 12:	
Section 7	84
Section 11	41
Section 12 (22)	31
Sections 43, 44	57
Section 67	99
Section 110	84
Section 132	39
Section 186	53
TITLE 13:	
Section 227	84
Section 235	84
TITLE 15:	
Section 235 (Pocket Supp.)	75
Section 341	102
TITLE 17:	
Section 5	16
Section 7	21
Section 55	21
Sections 78-80	21
Sections 81-86	21
Sections 91-119	21
TITLE 23:	
Section 43	41
TITLE 35:	
Section 101	44
Section 118	92
TITLE 36:	
Section 2	95
Section 68	95

INDEX—Continued

Page

TITLE 37:

Section 265	93
Section 750	62
Section 758	62

TITLE 45:

Section 253 (Pocket Supp.)	75
----------------------------------	----

TITLE 46:

Section 20	104
Section 65	5
Section 78	5

TITLE 49:

Sections 52-61	63
Sections 101-102	68

TITLE 51:

Section 3	10
Section 20	42
Section 39	10
Section 52	73
Section 53	56
Section 58	73
Section 60	58
Sections 110 (1), et seq.	12
Section 191	10
Section 276	36
Section 303	36
Sections 328, 332	12
Section 509	59

TITLE 52:

Sections 177-197	77
------------------------	----

TITLE 62:

Sections 95-103	21
-----------------------	----

CONSERVATION, DEPARTMENT OF:

Auxiliary State Forests—Distribution of payments made by owners upon withdrawal of lands from	90
---	----

Navigable waters and beds thereof—Authority to regulate fishing in	47
--	----

CONSTITUTION OF 1901:

Section 94	31
------------------	----

Section 190, as amended	21
-------------------------------	----

Section 194½, as amended	82, 106
--------------------------------	---------

Section 215 (a)	53
-----------------------	----

Section 224	93
-------------------	----

INDEX—Continued

	Page
CONVICTS:	
Performing hard labor in Jefferson County jail—Entitled to benefit of "Good behavior statute"	75
CORPORATIONS:	
Consolidation or merger—Fees due on	18
CORRECTIONS & INSTITUTIONS, DEPARTMENT OF:	
Tobacco manufactured by and given or sold to convicts—State not liable for Federal tobacco tax on	65
COSTS & FEES:	
Inferior Court Mobile County—Clerk—Sheriff—Scire facias—Fee for issuing and serving	51
COUNTIES:	
Appropriation for manufacturing plants—No authority to make	31
Depository in lieu of Treasurer—Selection of	57
Deputy Solicitor pro tem for County Court—Member of County governing body not eligible to appointment	84
Crippled Children's Clinic of Birmingham—No authority to appropriate funds to erect building for	63
Engineers—Nonresident of county—Authority to employ and furnish automobile	99
Engineer—Cannot hold office of county road and bridge foreman	99
Montgomery—Board of Revenue—License Inspectors—May purchase and maintain car for	49
Montgomery—Board of Revenue—List of tax assessments—May purchase for Sheriff	39
Sinking Fund—Assets of—When deductible in computing county's constitutional debt limit	93
Special tax of 1/4 of 1% levied under Section 215(a), Constitution 1901—Expenditure of proceeds	53
COUNTY BOARDS OF EDUCATION:	
Principal County High School—Employment as City Superintendent of Schools	77
COUNTY COURTS:	
Deputy Solicitor pro tem—Authority to appoint—Not entitled to compensation	84
Fine—No authority of Judge to allow payment of in installments	102

INDEX—Continued

	Page
COUNTY ENGINEERS:	
Cannot hold office of County road and bridge foreman	99
Court of County Commissioners—Authority to employ nonresident of county and furnish automobile	99
Montgomery County—Contract with Transportation Bureau with reference to public roads	41
COURTS OF COUNTY COMMISSIONERS:	
Appropriation for manufacturing plants—No authority to make	31
Crippled Children's Clinic of Birmingham—No authority to appropriate funds to erect building for	63
Depository in lieu of Treasurer—Selection of	57
Deputy Solicitor pro tem for County Court—Member of not eligible to appointment	84
Engineers—Nonresident of County—Authority to employ and furnish automobile	99
Montgomery County—Board of Revenue—List of tax assessments— May purchase for Sheriff	39
Montgomery County—License Inspector—May purchase and maintain car for	49
Special tax of 1/4 of 1% levied under Section 215 (a), Constitution 1901—Expenditure of proceeds	53

D

DEPOSITORIES:	
In Lieu of County Treasurer—Selection of	57
DRIVERS LICENSES:	
Revocation on conviction of driving while intoxicated and restrained from operating motor vehicle	96

E

ELECTIONS:	
Absentee ballots—Mimeographed affidavit attached to ballot by staples	16
Mobile County—City of Mobile—Elections—Precints—Wards— Districts—Voting places	21
EXEMPTIONS:	
Commissioned officers in Active Alabama National Guard—	

INDEX—Continued

	Page
Automobiles—Privilege tax and registration fee	44
Factories, industries, plants—Tax Assessor—No commission for assessing	10
Factories, industries, plants—Tax Collector—Not authorized to collect taxes on	10
License—General contractors—Officers, agents, servants or employees of U. S. Government, State of Alabama and municipalities	5
Poll tax—Members of the armed services of the U. S. under amend- ment to Sec. 194½ of Constitution of 1901—Not applicable to persons in services while U. S. was at peace	82
Poll tax—Members of armed services—Establishment of honorable service—Records of U. S. Military authorities cannot be impeached	106
Poll tax—Members of armed forces—Purpose of amendment to Section 194½, Constitution of 1901	106
State Naval Militia holding commission in U. S. Navy not exempt from privilege tax and registration fee on automobiles	44
Tobacco manufactured by Dept. of Corrections & Institutions and given or sold to convicts—State not liable for Federal tobacco tax on	65

F

FUNDS:

County sinking—Assets of—When deductible in computing county's constitutional debt limit	93
---	----

G

GUARDIAN & WARD:

Authority of guardian to take title and possession of property of ward—Effect of death, resignation or removal	87
---	----

H

HOUSTON COUNTY:

Engineer—Nonresident of county—Authority to employ and furnish automobile	99
--	----

I

INFERIOR COURTS:

Mobile County—Clerk—Sheriff—Scire facias—Fee for issuing and serving	51
---	----

INDEX—Continued

Page

INSURANCE:

State Military Department—Public liability and property damage— No authority to carry	92
--	----

J

JEFFERSON COUNTY:

Convicts in county jail required to perform hard labor—Entitled to benefit of "good behavior statute"	75
Expeditions and Economical Tax Appeals Act of 1943— Refund of payment pending appeal	12

JUDGE OF PROBATE:

Tax deed—Must execute after expiration of redemption period	36
---	----

L

LEASES:

Alabama Insane Hospitals—Oil and gas—Property granted by Congress at Mt. Vernon	33
--	----

LICENSES:

City directories—Compiling and selling	59
Directories—Compiling and selling	59
Municipalities—Dairies outside police jurisdiction using streets for delivery of products	62

LICENSE INSPECTORS:

Montgomery County—Board of Revenue may purchase and maintain car for	49
---	----

M

MILITARY & NAVAL AFFAIRS:

Commissioned officers in Active Alabama National Guard—Exemp- tions—Privilege tax and registration fee on automobiles	44
Poll tax—Exemptions under amendment to Sec. 194½ of Constitution of 1901—Not applicable to persons in service while U. S. is at peace	82
Poll tax—Exemptions—Purpose of Amendment to Sec. 194½, Constitution of 1901	106
Poll tax—Exemptions—Establishment of honorable service— Records of U. S. Military authorities cannot be impeached	106

INDEX—Continued

	Page
Soldiers' & Sailors' Civil Relief Act, as amended—Does not prohibit imposition of penalty for failure to assess property	73
State Military Department—Insurance—Public liability and property damage—No authority to carry	92
State Naval Militia holding commission in U. S. Navy not exempt from privilege tax and registration fee on automobiles	44
 MINORS:	
Redemption from tax sale after expiration of three years	36
 MOBILE COUNTY:	
Elections—City of Mobile—Precincts—Wards—Districts—Voting places	21
Inferior Court—Clerk—Sheriff—Fee for issuing and serving notice of scire facias	51
 MONTGOMERY COUNTY:	
Board of Revenue—List of tax assessments—May purchase for Sheriff	39
County Engineer—Contract with Transportation Bureau with reference to public roads	41
License Inspector—Board of Revenue authorized to purchase and maintain car for	49
 MUNICIPALITIES:	
City of Mobile—Election—Precincts—Wards—Districts—Voting places	21
Expenditure of Public funds to aid in securing legislation in Congress favorable to	79
Licenses—Dairies outside police jurisdiction using streets for delivery of products	62
Principal County High School—Employment as City Superintendent of Schools	77
 P 	
POLL TAX:	
Exemption—Members of the armed services of the U. S. under amendment to Sec. 194½ of Constitution of 1901—Not applicable to persons in service while U. S. was at peace	82
Exemptions—Members of armed forces—Purpose of amendment to Sec. 194½, Constitution of 1901	106

INDEX—Continued

Page

Members of armed services—Establishment of honorable service— Records of U. S. Military authorities cannot be impeached	106
--	-----

PUBLIC SAFETY DEPARTMENT:

Driver's license—Revocation on conviction of driving while intoxicated and restrained from operating motor vehicle	95
---	----

R

REDEMPTION:

Minors—After expiration of 3 year period	36
--	----

REFUNDS:

Jefferson County—Expedition and Economical Tax Appeals Act— Payment pending appeal	12
---	----

S

SCHOOLS:

Principal County High School—Employment as City Superintendent of Schools	77
--	----

SECRETARY OF STATE:

Corporations—Consolidation or merger—Fees due on	18
--	----

SHERIFFS:

Inferior Court Mobile County—Scire facias—Fee for serving	51
---	----

SOLDIERS' & SAILORS' CIVIL RELIEF ACT:

Penalty for failure to assess property—Does not prohibit imposition of	73
---	----

SOLICITORS:

Deputy Solicitor pro tem—Authority of county court to appoint— Not entitled to compensation	84
Circuit—Mileage—Expenses—Attending county court outside county of residence	84

STATE AND STATE DEPARTMENTS:

Military—Insurance—Public liability and property damage— No authority to carry	92
---	----

INDEX—Continued

	Page
Tobacco manufactured by Department of Corrections & Institutions and given or sold to convicts—State not liable for Federal tobacco tax on	65.
 STATE LICENSING BOARD FOR GENERAL CONTRACTORS:	
Exemptions—Officers, agents, servants or employees of U. S. Government, State of Alabama and municipalities	5.
 STOCK LAW:	
Election within precinct not authorized	8
 STREAMS:	
Navigable and beds thereof—Title to	47
Navigable and beds thereof—Department of Conservation— Authority to regulate fishing in	47
 T 	
TAX ASSESSORS:	
Assessments—Owner unknown for current year and prior years	56
Exemptions—Factories, industries, plants—No commission for assessing	10
 TAXATION:	
Ad valorem—Assessments—Owner unknown for current and prior years	56
Ad valorem—Redemption by minor children, heirs of owner	36
Auxiliary State Forests—Distribution of payments made by owner upon withdrawal of lands from	90.
Exemptions—Factories, industries, plants—Tax Collector not authorized to collect taxes on	10
Exemptions—Factories, industries, plants—Tax Assessor— No commission for assessing	10
Jefferson County—Expeditious and Economical Tax Appeals Act— Refund of payment pending appeal	12
Poll tax—Exemptions—Members of the armed services of U. S. amendment to Sec. 194½ of Constitution of 1901—Not applicable to persons in service while U. S. was at peace	82
Poll tax—Exemptions—Members of armed services—Establishment of honorable service—Records of U. S. Military authorities cannot be impeached	106.

INDEX—Continued

	Page
Poll tax—Exemption—Members of armed forces—Purpose of amendment to Sec. 194½, Constitution of 1901	106
Soldiers' and Sailors' Civil Relief Act, as amended—Does not prohibit imposition of penalty for failure to assess property	73
Tax deed—Judge of Probate must execute after expiration of redemption period	36
Tobacco manufactured by Dept. of Corrections & Institutions and given or sold to convicts—State not liable for Federal tobacco tax on	65
TAX COLLECTORS:	
Exemptions—Factories, industries, plants—Not authorized to collect taxes on	10
TAX SALES:	
Tax deed—Judge of Probate must execute after redemption period	36
TRIAL TAX:	
Disaster Loan Corporation—Not required to pay	42
U	
UNITED STATES:	
Disaster Loan Corporation—Trial tax—Not required to pay	42
Tobacco manufactured by Department of Corrections & Institutions and sold or given to convicts—State not liable for Federal tax on	65
U. S. C. A.:	
TITLE 15:	
Section 610	42
TITLE 26:	
Chapter 15, Sections 2000, et seq.	65
TITLE 50:	
Section 560, as amended	73
W	
WALKER COUNTY:	
Special tax of 1/4 of 1% levied under Section 215 (a), Constitution 1901—Expenditure of proceeds	53



